IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-598

LOUISVILLE & NASHVILLE RAILROAD COMPANY and STEVE HAVARD,

Petitioner.

versus

RHEETA HASTY, A Minor, By and Through Her Mother and Next Friend, MRS. FAYE HASTY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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INDEX

INDEX (Continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

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Petitioners, Louisville & Nashville Railroad Company and Steve Havard, hereby petition the Court for the issuance of a writ of certiorari to the Supreme Court of Mississippi to review its judgment entered July 12, 1978, affirming a judgment rendered February 17, 1976, by the Chancery Court of Jackson County at Pascagoula, Mississippi.

OPINIONS BELOW

The opinion and judgment of the Supreme Court of Mississippi, entered July 12, 1978, review of which is

sought, is reproduced in the Appendix at pages 1a-6a. The petition of the Petitioners for rehearing or, in the alternative, supplemental opinion is reproduced at pages 7a-9a. Notice of denial of same is reproduced at pages 9a-10a. The orders of the Chancellor on jurisdictional and constitutional objections raised by Petitioners are reproduced in the Appendix at pages 10a-12a. The opinion of the Chancellor on the merits of the case is not reproduced, for the reason that the Chancellor, having previously ruled upon the constitutional objections, dealt only with the facts of the case in the opinion. The decree of judgment in the amount of $125,000.00, plus interest and costs, is reproduced at pages 12a-13a, although the Chancellor, as in the opinion, did not mention constitutional objections. Motion for new trial filed by Petitioners in the Chancery Court is reproduced at pages 13a-16a. Order of the Chancellor overruling same is reproduced at page 16a.

The attachment in chancery statutes which are in question here are reproduced in the Appendix at pages 17a-19a.

JURISDICTION

The judgment of the Mississippi Supreme Court was entered July 12, 1978. Timely petition for rehearing was filed and was denied by the Court on July 26, 1978.

Jurisdiction to review the judgment of the Supreme Court of Mississippi by certiorari is conferred on this Court by 28 USCA §1257(3).

QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review:

I. Whether the Mississippi attachment in Chancery statutes, Section 11-31-1, *et seq.*, Mississippi Code, 1972, are violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that under said statutes:

(1) No court order is required prior to issuance of a writ of attachment of property;

(2) Defendant's property is attached by issuance of process at the sole instance and discretion of plaintiff and plaintiff's attorney;

(3) No bond is required prior to attachment of defendant's property;

(4) No showing of entitlement, by affidavit or evidence, is required prior to issuance of the writ of attachment;

(5) No review by any judicial officer or clerk is provided, either prior to or after the attachment of defendant's property;

(6) Defendant can dissolve the attachment only by posting satisfactory bond;

(7) No procedure is afforded for defendant to challenge validity of the attachment;

(8) Not even a rudimentary ex parte hearing is required;

(9) Defendant must prevail on the merits to obtain relief from the attachment;

(10) Defendant whose property is attached must enter general or personal appearance and defend on the merits, or suffer default and judgment against attached property.

II. Whether the Mississippi Attachment in Chancery Statutes, Section 11-31-1, et seq., Mississippi Code, 1972, as applied to the Petitioners, are violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, in that the Petitioner, a non-resident corporation which has fully qualified to do business under the corporate laws of Mississippi, with duly appointed resident agent for personal service of process, and, therefore, available for *in personam* jurisdiction, is taken before a chancellor alone, without jury, by the legal device of an attachment of property to adjudicate an unliquidated claim for damages in tort, while all resident corporations, all resident persons, non-resident motorists and other non-residents without property in the state, can be sued only in a jury court in such cases.

III. Whether it is constitutional under the Due Process Clause of the Fourteenth Amendment to require a common-law action for unliquidated damages for a claim arising in tort to be tried in Chancery, a court of equity, without a proper jury, and with no opportunity for a proper jury under the laws of Mississippi.

STATUTES INVOLVED

This case was commenced against Petitioners by way of non-resident attachment in Chancery Court, Section 11-31-1, et seq., Mississippi Code, 1972, said statutes being set forth in the Appendix at pages 17a-19a, and being also set forth in full, along with complete recitation of related attachment at law statutes, at footnotes 5-8 and 10-17 printed in the opinion of *Mississippi Chemical Corporation* v. *Chemical Construction Corporation*, 444 F.Supp. 925 (S.D. Miss. 1977)

Also involved are the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States, reproduced at pages 19a-20a.

STATEMENT OF THE CASE

I

Statement Of Facts

Petitioner, Louisville & Nashville Railroad Company, is a Kentucky corporation, duly qualified under the corporate laws of Mississippi to do business in the state, with an appointed resident agent for personal

service of process upon the corporation in Mississippi, as is required under the corporation laws. It also owns tracks, rights-of-way, buildings, equipment, funds and other property in the state.

Petitioner Steve Havard is a resident of the State of Alabama, employed by the railroad as an engineer.

W. J. McRaney is not a Petitioner, nor was he a defendant. He is merely the station agent for the railroad at Pascagoula, Mississippi, who was named and served as the "possessor" of the list of railroad property attached.

As a result of a railroad crossing accident which occurred in Gulfport, Harrison County, Mississippi, Respondent filed a personal injury suit for damages in Pascagoula, in Jackson County, a neighboring county. Suit was filed in the form of a non-resident attachment of Petitioner Louisville & Nashville Railroad Company's property in Chancery Court, rather than in the conventional manner of filing a common-law suit in a court of law and serving process upon the railroad's appointed resident agent. In short, Respondent chose to commence the action *in rem* or *quasi in rem*, by attachment of property rather than *in personam*, by serving the railroad's appointed resident agent, who was conveniently available for personal service.

But for the assumption of jurisdiction of the railroad, the Chancellor could not have taken jurisdiction of the Petitioner Havard, but, having taken jurisdiction for one purpose, Chancery takes jurisdiction for all purposes. Griffith, *Mississippi Chancery Practice* § 28 (2d ed. 1950). Havard was served as a non-resident by service upon the Secretary of State according to the long-arm statute, §13-3-63, Mississippi Code, 1972.

Mississippi has separate courts of equity (Chancery) and courts of law, and proper juries are not provided in equity courts.

No court or judicial officer was involved in any pre-attachment review. No bond was required, no affidavit or evidence was required, and attachment issued solely on Respondent's filing of suit. Petitioners had no opportunity to oppose attachment prior to issuance thereof.

Petitioners appeared specially to contest the attachment, attack the jurisdiction and raise federal and state constitutional questions. As to the attachment procedure, the statutes, the attachment in Chancery of a non-resident, domesticated corporation, and the denial of a proper jury trial in a tort claim for damages, the Petitioners complained of violations of the Fifth, Seventh and Fourteenth Amendments, denials of equal protection and due process, and violations of state laws. All motions were overruled by the Chancellor. (10a-12a)

After answering and thereby entering personal appearance, Petitioners went to trial before the Chancellor alone, without jury, and judgment *in personam* against Petitioners was awarded to Respondent in the amount of $125,000.00 plus interest and

costs. (12a-13a) Petitioners raised the same issues on motion for new trial, which was overruled, and Petitioners, raising the same issues, appealed to the highest court in the state, where the Chancellor was affirmed. (1a-6a) Petition for rehearing (7a-9a) was denied. Petitioners now seek certiorari.

II

Proceedings Below

This personal injury suit was filed in Chancery Court of Jackson County, Mississippi, at Pascagoula, Mississippi, as a Bill of Attachment in Chancery, attaching "... the funds, personal property, real property, and all of the property, regardless of kind or character, of the non-resident Defendant, Louisville & Nashville Railroad Company ... including those articles at railroad stations in Jackson County ... being held by W. J. McCraney, station agent ...."

Petitioners made special appearances on motions attacking jurisdiction and raising various issues under the Mississippi and United States Constitutions, citing the Fifth, Seventh and Fourteenth Amendments. The Chancellor overruled all motions. (10a-12a) Before being put to trial Petitioners made the useless gesture of requesting a jury in Chancery, which was denied.[1]

1 Jury trial in Chancery Court in Mississippi, if provided by the Court, is totally useless as a jury in the traditional sense of juries in a court of law. In the text on Chancery practice in Mississippi, it is noted that juries in Chancery amount to virtually nothing.

"Because ... (1) of the delay, (2) of the additional public expense, and (3) because the verdict of a jury in chancery is purely advisory and the chancellor may entirely disregard it, such a submission in an equity case is seldom allowed or desired. The granting of a jury trial in an equity case is not a matter of right, but is wholly discretionary with the chancellor; and being entirely discretionary with him he may revoke an order of reference before the case is tried, or he may disregard the finding of the jury when made. As a further consequence of this discretion, the action of the chancellor with reference to the jury and to the issues before the jury cannot be reviewed, so that upon appeal the question is whether upon the record the decree is correct irrespective of the jury and in the same manner as if no jury had been present." Griffith, *Mississippi Chancery Practice* § 597 (2d ed. 1950).

The suit was answered by Petitioners, thereby, making personal appearance, and trial was had on the merits. The Chancellor found for Respondent and entered a decree of judgment against Petitioners in the amount of $125,000.00, plus court costs and interest. (12a-13a) Motion for new trial was overruled. (16a) Appeal was then taken to the Supreme Court of Mississippi, which affirmed the Chancellor. (7a-9a) Petition for rehearing (7a-9a) was denied. (9a-10a) The ruling of the Supreme Court of Mississippi is final, and there is no further review, except here.

REASONS FOR GRANTING THE WRIT

The Mississippi non-resident attachment in Chancery statutes are unconstitutional on their face and as applied to Petitioners, and the Supreme Court of Mississippi, by declining to so rule, is not in accord with applicable decisions of this Court and lower Federal Courts.

In *Shaffer v. Heitner*, 433 U. S. 186 (1977), this Court held the Delaware non-resident attachment in Chancery statutes unconstitutional under the Due Process Clause as applied to circumstances similar to

those of the present case. The Delaware statutes are almost identical to the Mississippi statutes.

The United States District Court for the Southern District of Mississippi has specifically held the Mississippi non-resident attachment statutes unconstitutional on their face and as applied to facts similar to the present case, for lack of Due Process. *Mississippi Chemical Corporation* v. *Chemical Construction Corporation*, 444 F. Supp. 925 (S.D. Miss. 1977).

Delaware and Mississippi not only have the same non-resident attachment in Chancery statutes, but these two states, as will be shown later, are the only two jurisdictions among all the states and territories which both have separate equity (chancery) courts and apply their non-resident attachment in chancery statutes to non-resident, domesticated corporations. The result is denial of Equal Protection, because residents, resident corporations and non-residents who do not own property in the state but come under the long-arm statute are entitled to trial in damage suits in a court of law, with proper jury; whereas, non-resident, domesticated corporations, such as Petitioner, with property or debts in the state are taken into Chancery by the unnecessary "device" of attachment and forced to try damage suits without juries.

Such attachments are frequent in the State of Mississippi on Petitioners and others, and there are special and important reasons beyond the money judgment in this case why the Supreme Court should grant certiorari.

I. Certiorari Should Be Granted Because The Statutes Violate Due Process On Their Face And As Applied Here And The Decision Below Is Contrary To Applicable United States Supreme Court And Lower Federal Court Decisions

Section 11-31-1, *et seq.*, Mississippi Code, 1972, the Mississippi non-resident attachment in Chancery statutes, are violative of the Due Process Clause of the Constitution of the United States on their face and as applied to the Petitioners.

Viewing these very statutes on their face, the United States District Court for the Southern District of Mississippi said,

> " . . . [E]ven viewed as a mechanism for conferring quasi in rem jurisdiction, the Mississippi chancery attachment procedure fails to attain minimal standards of due process. The statutory procedure may be implemented in the sole and unreviewable discretion of the plaintiff's attorney and may be invoked even in cases, such as the case before the Court, where there is neither the need for swift action nor a foreign debtor who truly may not otherwise be subjected to the state court's jurisdiction. [They] . . . are unconstitutional because they do not require the plaintiff to obtain any court ordered writ of sequestration or garnishment, the obligation of the attachment defendant to the non-resident principal defendant being bound by the service of process

made at the sole instance and discretion of the plaintiff's attorney; no bond is required of the plaintiff nor is there any requirement that the plaintiff show, by affidavit or otherwise, that he is in any way entitled to the attachment; there is no review either prior to nor after service upon the attachment defendant of the propriety of the attachment by a disinterested, neutral judicial officer, the principal defendant can dissolve the attachment only by posting a satisfactory bond, and no procedure exists whereby the principal defendant can challenge the validity of the attachment on the grounds of procedural irregularity, excessiveness of the attachment, lack of merit of the underlying claim, or any other reason; only by prevailing at trial on the merits can the principal defendant obtain relief from the attached indebtedness; all debts owing to the principal defendant are subject to attachment regardless of where the debts arose, provided only that the attachment defendant be served within the State of Mississippi; and finally, the statutes do not require even a rudimentary *ex parte* hearing." *Mississippi Chemical Corporation* v. *Chemical Construction Corporation*, 444 F.Supp. 925, 938.

The Mississippi Supreme Court, in its opinion below, said that the facts of the *Mississippi Chemical* case, *supra*, appear to differ from the facts of the case at bar, and then declined to rule the Mississippi attachment in Chancery Statutes violative of due process. (A. 4a)

First, the lower Court was wrong in that a statute which is unconstitutional on its face must fall regardless of differences in facts of cases to which it applies. Second, the facts of the case are, indeed, very, very similar. Chemical Construction, a non-resident corporation, qualified to do business in Mississippi (domesticated), with appointed resident agent for service of process, was sued for damages by Mississippi Chemical by way of non-resident attachment in Chancery of monies of Chemical Construction in the hands of others.

In the instant case, monies and other property of the railroad, a non-resident, domesticated corporation, with appointed resident agent for process, were attached in the hands of W. J. McCraney by a non-resident attachment in Chancery for jurisdiction in a damage suit.

Obviously, the Mississippi Supreme Court did not wish to rule a Mississippi statute unconstitutional, but by avoiding the issue, presumably because *Mississippi Chemical, supra.*, came down after briefing was completed, the Court upheld the statute. There was no doubt as to the clear ruling of the Mississippi Supreme Court in the eyes of the local chancellor, who in the companion case said:

> "The Defendants again challenge the constitutionality of the attachment statute. The Court is urged to find that the case of *Mississippi Chemical Corporation* v. *Chemical Construction Corporation*, 444 F.Supp. 925 (S.D. Miss.1977), has resolved the

issue in their favor and that this Court is without jurisdiction in that the statutes are unconstitutional.

These issues were clearly presented and definitely resolved against the defendants by the Mississippi Supreme Court in the companion case of *Rheeta Hasty* v. *Louisville and Nashville Railroad Company*, (Supreme Court Cause No. 50,229). While the Supreme Court declined to consider the *Mississippi Chemical* case [Presumably because it was handed down after the Hasty case was briefed.], it did note that the facts of that case appear to differ from the case before it. I agree." (Brackets added.) (A. 22a)

Obviously, the cases do not differ at all in the material aspects relating to the issue here.

The Mississippi non-resident attachment in Chancery statutes, either standing alone or as applied to Petitioners, do not meet the "fair play and substantial justice" standard of *International Shoe* v. *State of Washington*, 326 U.S. 310, 66 S.Ct. 154 (1945).

In *Shaffer* v. *Heitner*, 433 U.S. 186, 97 S.Ct. 2569 (1977), non-residents of Delaware were sued in Chancery Court in Delaware by attachment of their stock in a Delaware corporation, under authority of attachment statutes like those in Mississippi. Like the Mississippi statutes, *in personam* jurisdiction and judgment could be obtained because defendant was required to enter general appearance.

In *Shaffer, supra.*, the Supreme Court noted that the only role played by the property attached was to provide the basis for bringing the defendant to court. In the instant case, the only role played by the attached property was to bring the Petitioner before the Chancery Court.

In *Shaffer*, the "minimum contacts" standard was discussed, and while the Petitioners here had substantially more "contacts" through more property and domestication, they were treated, for purposes of jurisdiction, as if they had no contacts except the attached property. The sole basis for jurisdiction was the property. For purposes of attachment it is not even relevant, and it is not necessary to allege the happening of an accident in Mississippi.

As in *Shaffer*, the property attached in this case was not the subject matter of the litigation, was not the underlying cause of the controversy and was totally unrelated to the cause of action.

These cases, together with *Fuentes* v. *Shevin*, 407 U.S. 67, 92 S.Ct. 1983 (1972); *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601, 95 S.Ct. 719 (1975), and others, tell us that the Petitioners have been denied Due Process. There is state action through the sheriff's service of process and the action of the Court, there is deprivation of property, however temporary, and corporations are entitled to the same protection as individuals. *Sniadich* v. *Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820 (1967); *Mitchell* v. *W. T. Grant Company*, 416 U.S. 600, 94 S.Ct. 1895 (1974).

II. Certiorari Should Be Granted Because The Statutes As Applied Deny Equal Protection Of The Laws To Petitioners

Petitioner, Louisville & Nashville Railroad Company, as a non-resident, domesticated corporation, required to have a resident agent for personal service of process, and all non-resident, domesticated corporations are discriminated against and denied Equal Protection of the laws by the combined effect of treating domesticated corporations as non-residents and allowing them to be attached in Chancery as was done here.

Sections 79-1-23 and 79-1-25, reproduced in the Appendix, at pages 20a-21a, state that upon domestication, a non-resident corporation becomes ". . . to all intents and purposes a corporation of this state . . ." and is entitled to all rights and privileges and is subject to the duties and obligations of Mississippi corporations. Moreover, service upon the agent or the secretary of state is deemed as effectual as personal service, the venue shall be the same as if served upon the officers of a Mississippi corporation, and the laws of Mississippi relating to suits against corporations shall apply.

Clearly and obviously, the statute does not mean what it says. Mississippi corporations and resident citizens cannot be attached in Chancery in the absence of an affidavit of "absconding".

Mississippi has repeatedly approved such attachments, as indicated by numerous Mississippi at-

tachment cases cited in the Mississippi Supreme Court opinion in the instant case, reproduced at pages 1a-6a.

Of the 50 states, the several territories, the District of Columbia and the Federal judiciary, there are only four jurisdictions, Arkansas, Delaware, Tennessee and Mississippi, which have entirely separate Chancery, or equity Courts. One other jurisdiction, New Jersey, has a Chancery division within its Superior Court. Therefore, including New Jersey, five jurisdictions can be said to have separate Chancery, or equity, Courts. England, which gave us the foundation for our judicial system, long ago abolished separate Chancery.

The impact and significance of the foregoing, as it relates to Equal Protection through the discriminatory attachment of property and denial of jury trials to non-resident, domesticated corporations, is startling when it is realized that only the states of Mississippi and Delaware, among the five which still retain a Chancery, or equity, system, allow attachment of property of domesticated foreign corporations as non-residents. Illustrative of Delaware is the case of *Albright* v. *United Clay Production Co.*, 62 A. 726 (Del. 1904). *Shaffer* defendants were not domesticated corporations.

The other three, Arkansas (*Sinclair Refining Co.* v. *Bounds*, 198 Ark. 149, 127 S.W.2d 629 (1939)), New Jersey (*Goldmark* v. *Magnolia Metal Co.*, 47 A. 720 (N.J. 1900)), and Tennessee (*Brewer* v. *De Camp Glass Casket Co.*, 201 S.W. 145 (Tenn. 1917)), do not allow

domesticated foreign corporations to be attached as non-residents in Chancery.

Therefore, according to research before the effect of *Shaffer, supra*., which arose in Delaware, it boils down to only two jurisdictions, Mississippi and Delaware, where a non-resident, domesticated corporation would be denied Equal Protection and be denied a jury trial by way of an attachment, while residents, resident corporations and others are entitled to be tried in a jury court Where attachment is used for jurisdictional purposes in the other jurisdictions, a proper jury trial would obviously be available, because law and equity are combined in the same court.

It should be of great concern that a domesticated corporation such as the Petitioner can have its property attached and can be denied a jury trial through a device, a gimmick, a legal fiction, while resident citizens and corporations in a similar suit are entitled to a jury trial in a personal injury action and are not subject to attachment.

Some of the rationale for not allowing non-resident attachments of domestic corporations in so many states is expressed by the Louisiana Supreme Court, which said:

> "To hold otherwise would lead to practical results highly injurious and detrimental to commercial and industrial operations, as it would permit the seizure and tying up of the property of corporations engaged in vast business enterprises, not only at the instance

> of those who might have more or less valid claims against the corporations, but also at the whim and caprice of every suitor who might fancy he had an action against said companies or might institute such suits to annoy, inconvenience, and harass the corporations in order to force unjust compromises and settlements. *Burgin Bros. and McLane* v. *Barker Baking Co.*, 95 So. 231 (La. 1926)."

Even Mississippi's non-resident motorist, long-arm statute, Section 13-3-63, Mississippi Code, 1972, brings the non-resident to a court of law and not to Chancery.

Cases are myriad which say that a discrimination or different treatment must have sound and reasonable basis and there should be rational basis for a differentiation between the two. Foreign corporations coming into a state are as much entitled to equal protection as persons and citizens of a state. *Quaker City Cab* v. *Commonwealth of Pennsylvania*, 277 U.S. 389, 48 S.Ct. 553 (1928).

There is no sound, reasonable or rational basis for permitting attachment of property of non-resident, domesticated corporations and requiring them to go to a court of equity, while resident corporations and individuals are not so treated.

III. Certiorari Should Be Granted Because Denial Of A Proper Jury Trial In A Personal Injury Claim For Unliquidated Damages Denies Due Process And Equal Protection To The Petitioners

Petitioners are entitled to a proper jury trial in a claim which is basically a claim at law, and not of equity. To deny them this right is to deny them Due Process and Equal Protection of the laws.

Ordinarily the parties to an action or proceeding in equity do not have the right to a jury trial. *Corpus Juris Secundum* states that the right to a jury trial often turns on whether or not the action is one properly cognizable in equity. The question is determined by the real nature of the action, as shown by the pleadings of all the parties and the nature of the relief sought. 50 C.J.S. *Juries*, §23. The showing of equity jurisdiction must be real and substantial. *Di Giovanni* v. *Camden Fire Ins. Ass'n.*, 56 S.Ct. 1, 296 U.S. 64, 80 L.Ed. 47.

The Mississippi Supreme Court has stated that a party need not show equity independent of the attachment statute to establish the Chancery Court's jurisdiction. This, then is purely statutory jurisdiction and the determination of whether the defendant is entitled to a jury trial should be made by looking to the nature of the cause, and whether at common law the right of trial was accorded such an action.

The Mississippi non-resident attachment statute is an unconstitutional denial of Equal Protection and Due Process as applied in the instant case because it deprives a party of his right to trial by jury. A number of jurisdictions have held that the power of the legislature to expand the Chancery jurisdiction cannot be so exercised as to deprive a party of the right to a trial by jury guaranteed by the Constitution. *People*

v. *One 1941 Chevrolet Coupe*, 37 C.2d 283, 231 P.2d 832 (1951); *In Re Garfield's Estate*, 14 N.Y. 2d 251, 251 N.Y.S. 2d 7, 200 N.E. 2d 196 (1964); *Kwas* v. *Kersey*, 139 W. Va. 497, 81 S.E. 2d 237 (1954). Nor have legislatures been allowed to convert a legal into an equitable cause of action, or confer on Courts of equity jurisdiction of a matter of purely legal nature which otherwise would be properly cognizable only in Courts of law. *People ex rel. Lemon* v. *Elmore*, 256 N.Y. 489, 177 N.E. 14 (1931).

The guarantee of a jury trial contained in the United States Constitution appears to be a limitation primarily upon the power of the Federal government, and does not prohibit the states from regulating and restricting the right of trial by jury in the state Courts as they may deem proper in a civil action. 50 C.J.S. *Juries*, §10. However, where the denial constitutes a denial of Due Process and Equal Protection of the laws, we contend that these guarantees of the Constitution of the United States come into play as further evidence of the rights of Petitioners.

After the Court had overruled all of the Motions of the Petitioners relative to transfer to Circuit Court, denial of jury trial by way of attachment in Chancery, etc., the Petitioners moved, as a last resort, for a jury trial in Chancery. Jury trial was denied on the ground that it was untimely sought, although Petitioners disagreed with this observation, for the reason that the Motions which were filed complained of a lack of jury trial at all stages.

While the right to a jury in Federal Court is not the same as in State courts, guidance is provided by cases which say that if an action is basically one at law, the issues should be tried to a jury, and the right to a jury cannot be abridged by characterizing the case as equity. *Murphy* v. *American Motors Sales Corporation*, 410 F.Supp. 1403 (N.D. Ga. 1976).

Noteworthy is the fact that the order overruling our final constitutional arguments was not entered until August 6, 1974, and the Chancellor proceeded with trial that very day. If Petitioners were "stuck" in Chancery, a jury was wanted, however minimal and useless, and motion was made for it. Footnote 1, *supra.*, amply shows that a Chancery jury is next to none at all, and, unbelievably, a chancellor is not even subject to review for either refusing to provide a jury or disregarding a jury's findings. Griffith, *Mississippi Chancery Practice*, Section 597 (2d ed. 1950).

CONCLUSION

Respondent, an Alabama resident, could have sued Petitioners in Alabama, where the railroad has similar operations and property as in Mississippi and where Petitioner Havard resides. Suit could have been brought in a court of law in Gulfport or Biloxi, in Harrison County, Mississippi, where the accident occurred, or in other jurisdictions. Respondent could have filed this non-resident attachment in Chancery in Harrison County. Instead, it was filed in Jackson County Chancery Court, Pascagoula.

Logically, there can be only two reasons why the device of attachment in chancery would be employed

to sue a domesticated non-resident corporation which is amenable to personal service in a court of law:

(1) To bring the case before a particular chancellor.

(2) To deny the corporation a jury trial.

Indicative of the whipsaw into which non-resident, domesticated corporations can be thrown by operation of the unconstitutional attachment statute in Mississippi is what has happened to Petitioners in this accident. There were two injuries and one death in the accident from which this case arose. One injury case was tried as Cause Number 8878 in the Circuit Court of Jackson County, Mississippi, before a jury, and Petitioners won a jury verdict for the defendants there on November 15, 1973. Plaintiff's motion for new trial was taken under advisement and held by the Circuit Judge. Respondent, the other injured party, then filed the instant attachment in the Chancery Court, down the hall, on December 12, 1973. After the Chancellor had found for Respondent and entered judgment of $125,000.00 on February 17, 1976, the Circuit Court, where the jury verdict had been won by Petitioners, entered an order on April 5, 1976, sustaining the pending motion for new trial there. Then, on May 27, 1976, the death case from the same accident was filed against Petitioners by non-resident attachment in Chancery as Cause Number 30,800. The new trial has not yet been held in the Circuit Court, down the hall. The same Chancellor has also overruled all jurisdictional and constitutional motions in the death case (A. 21a-25a), and a trial was held before the Chancellor on September 20, 1978. No decision has been rendered

APPENDIX

IN THE SUPREME COURT OF MISSISSIPPI

NO. 50,229

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL.

versus

RHEETA HASTY

BEFORE ROBERTSON, WALTER AND COFER

WALKER, JUSTICE, FOR THE COURT:

This is an appeal from a decision of the Chancery Court of Jackson County, Mississippi, awarding Rheeta Hasty, plaintiff below, $125,000 for injuries she suffered in a collision between the van in which she was riding and one of appellant's trains.

The appellant railroad company first contends that the chancellor's action in taking jurisdiction of this matter as an attachment in chancery was erroneous and in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution, since the appellant foreign corporation was fully domesticated.

The chancellor took jurisdiction of this case pursuant to Mississippi Code Annotated section 11-31-1 (1972), on the ground of the nonresidency of the appellant, a Kentucky corporation. The appellant

argues that this action violated its right to equal protection of the laws because as a domesticated corporation under Mississippi Code Annotated section 79-1-23 (1972), it was ". . . to all intents and purposes a corporation of this state, and . . . [was] entitled to all the rights and privileges and . . . subject to all the duties, obligations, restrictions, liabilities, limits and penalties conferred and imposed by the laws of this state upon similar corporations incorporated under the laws of this state."

In *Southern Motor Express Company v. Magee Truck Lines, Inc.*, 181 Miss. 223, 177 So. 653 (1938), the Court held that a foreign corporation domesticated in Mississippi was nevertheless to be considered a resident of its state of incorporation for jurisdictional purposes and was, therefore, subject to the jurisdiction of the chancery court in an attachment suit. The appellant argues that this holding denies it equal protection of the law because under section 79-1-23, it is ". . . to all intents and purposes a corporation of this state . . . ."

This argument is not well taken. In *Southern Motor Express Co.*, the Court stated:

> Whatever may be the full import of the domestication statutes, we think it may be safely said that they do not operate to make two separate and distinct corporations. The foreign corporation domesticated here still remains one corporation, and it must, therefore, have its domiciliary residence in one state and not in both. Thus, it seems the

> more reasonable to ascribe that residence to the original state which above others has visitorial and supervisory powers over it, as well as the final authority to dissolve it. (181 Miss. at 228, 177 So. at 653).

The visitorial and supervisory powers and final authority to dissolve the corporation vested in the state of incorporation all provide a firm basis for distinguishing domesticated foreign corporations from domestic corporations for jurisdictional purposes. Therefore, we hold that the appellant was not denied equal protection in this case. *See* Clark v. Louisville & N.R. Co., et al., 158 Miss. 287, 304-05, 130 So. 302, 308 (1930).

Appellant next contends that its constitutional right to a jury trial was violated by the chancery court in taking jurisdiction of this case. However, this issue has previously been decided adversely to appellant and appellant has not advanced any arguments which would persuade us to overrule those cases. *See* Illinois Central Railroad Co. v. McDaniel, 246 Miss. 600, 151 So.2d 805 (1963); Matthews v. Thompson, 231 Miss. 258, 95 So.2d 438 (1957); Talbot & Higgins Lumber Company v. McLeod Lumber Company, 147 Miss. 186, 113 So. 433 (1927).[1]

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1 On the oral argument of this cause, the appellant raises the possibility that the attachment in chancery statute violates procedural due process, citing *Miss. Chemical Corp. v. Chemical Const. Corp.*, 444 F. Supp. 925 (S.D. Miss. 1977). However, since this issue was not briefed and since the facts of *Miss. Chemical* appear to differ from the facts of the case at bar, we decline to consider this issue.

The next contention of the appellant is that the chancellor erred in taking jurisdiction of this cause as "minor's business," because section 159 of the Mississippi Constitution does not confer upon the chancery court jurisdiction to decide facts and award damages in a minor's tort claim for damages.

In response to one of the several pretrial motions to dismiss filed by the appellants, the chancellor observed that he had jurisdiction because the matter involved a minor and the chancery court has jurisdiction over all matters involving minors. It appears that the chancellor was relying upon section 159 of the Mississippi Constitution as authority for his statement. However, such reliance was misplaced. In the recent case of *McLean v. Green*, 352 So.2d 1312 (Miss. 1977), we stated:

> While it is true that both complainants were minors, this case neither involved nor required any equitable relief. An analysis of the case law concerning Section 159(d) clearly shows that the jurisdiction of the chancery court over minors is limited to matters involving equitable relief. The action at bar arises from a tort claim, and we have made it clear previously that courts of equity should not assume jurisdiction over claims for personal injury. *Evans v. Progressive Casualty Insurance Company*, 300 So.2d 149 (Miss. 1974); 30 C.J.S. Equity § 28 (1965). One reason for such a rule is that historically tort claims have been tried by jury. In chancery court, with some few statutory exceptions, the right

> to a jury is purely within the discretion of the chancellor, and if one is empaneled, its findings are totally advisory. Our constitution, Mississippi Constitution, § 31 (1890), provides that the right to trial by jury shall remain inviolate, but in this case, the chancellor's assumption of jurisdiction of this common law action has deprived the defendant of this right. Although we hold that the chancellor was in error, Mississippi Constitution, § 147 (1890) prevents reversal solely on the ground of want of jurisdiction . . . .
>
> . . . .
>
> Despite the mandate of § 147, we look with disfavor upon and consider it an abuse of discretion for a chancellor to assume jurisdiction of a common law action which properly should be tried in a court of law where the right to trial by jury remains inviolate. But absent other error, we cannot reverse. (352 So.2d at 1314).

The appellants' fourth assignment of error is that the chancellor based his decision upon facts which were not reflected in the record and said decision is against the overwhelming weight of the evidence. We have carefully considered the arguments advanced by the appellants in support of this assignment of error, but after a thorough review of the record, we are unable to say that the chancellor's findings were manifestly wrong.

The final assignment of error is that the judgment of $125,000 is excessive. Appellants base this assign-

ment on the fact that the appellee's medical and hospital bills totaled $10,701.71 and the fact that her fractures were healing properly. On the other hand, as the appellants concede, she had a ten percent permanent partial disability of the spine and a ten percent disability of the lower left extremity and some disability of the right lower extremity. There also was uncontradicted testimony that the appellee had undergone, and was still in, considerable pain and there was evidence that she underwent a personality change as a result of the accident and psychiatric help in the future was indicated. Under the circumstances, we cannot say that the award was excessive.

For the foregoing reasons, the decree of the chancery court is affirmed.

AFFIRMED.

PATTERSON, C.J., SMITH, P.J., ROBERTSON, P.J., SUGG, BROOM, LEE, BOWLING AND COFER, JJ., CONCUR.

[Filed: July 12, 1978]

IN THE SUPREME COURT OF MISSISSIPPI

CAUSE NUMBER 50,229

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, a Kentucky Corporation, and STEVE HAVARD, Individually, and as Agent for Louisville and Nashville Railroad Company,

Appellants,

versus

RHEETA HASTY, a Minor, By and Through Her Mother and Next Friend, Mrs. Faye Hasty,

Appellee.

PETITION FOR REHEARING

NOW COME the Appellants, the Louisville and Nashville Railroad Company, et al., and petition this Court for rehearing in the above styled and numbered cause, and in support thereof, would show unto the Court as follows, to-wit:

In Motions before the Chancery Court and in the Brief of the Appellants, the constitutionality of the attachment procedure under Amendment XIV of the Constitution of the United States was raised.

The bulk of the oral argument presented before the Court by both Appellants and the Appellee dealt with the issue of unconstitutionality of the Mississippi Attachment Statute, Section 11-31-1, Mississippi Code Annotated (1972), and, during the course of that argu-

ment, Justice Robertson requested, and was furnished within minutes after the argument was concluded, a copy of the decision in *Mississippi Chemical Corporation v. Chemical Construction Corporation*, decided November 22, 1977, from the Southern District of Mississippi. The case was discussed thoroughly on oral argument. That case, with abundant authorities cited therein, found the Mississippi Attachment in Chancery Statute unconstitutional on its face and unconstitutional as applied in a similar circumstance, and found such unconstitutionality under Amendment XIV of the Constitution of the United States.

This Court should rule as to whether Section 11-31-1 is unconstitutional on its face, or as applied. This is important, because a companion case growing out of the same accident and founded upon an attachment in Chancery is now pending in the Chancery Court of Jackson County as Cause Number 30,800. We believe this Court should state that Section 11-31-1 is either unconstitutional or is not so that the position of this Court can be known on the matter and so that the parties may file for certiorari to the United States Supreme Court, if they so choose, with the knowledge of where the Mississippi Supreme Court stands on the issue. There is no logical reason to avoid or delay confrontation of this issue. It will be before the Court again and again.

Wherefore, the Petitioners respectfully request the Court to grant rehearing, or, in the alternative, to recall the opinion for an addendum or supplement which squarely confronts the issue of whether or not Section 11-31-1 is unconstitutional on its face or as applied herein, under Amendment XIV of the Constitution of the United States.

Respectfully submitted,

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, et al.
MEGEHEE, BROWN & WILLIAMS
/s/ RAYMOND L. BROWN
RAYMOND L. BROWN

[Dated: July 17, 1978]

THE COURT SITTING EN BANC:

50,229 Louisville & Nashville Railroad Co., et al. v. Rheeta Hasty, etc.; Chancery, Jackson; Petition for Rehearing Denied.

50,283 Robert C. Stovall, Jr. v. Richard M. Stovall; Chancery, Chickasaw; Petition for Rehearing Denied. Walker, J., Took No Part.

50,323 James Lee Tolbert Jr., et al. v. Monroeby Tolbert Helms; Chancery, Lee; Petition for Rehearing Denied.

50,375 Hank Leonard Williams, A Minor, by his Mother Betty Williams v. Southeastern Hatcheries of Miss., Inc., Morton Broiler Farms, Inc., & Macie H. Myers; Circuit, Scott; Petition for Rehearing Denied.

50,406 O. J. Stanton & Co., Inc., et al. v. Robert L. Dennis and Jerry C. Watkins, d/b/a D & W Constr. Co.; Chancery, Hinds; Petition for Rehearing Denied.

50,418 Alabama Great Southern Railroad Co., v. James E. Jarrell; Circuit, Pearl River; Petition for Rehearing Denied.

50,476 Ronnie Gene Knight v. State; Circuit, Leflore; Petition for Rehearing Denied.

[Filed: July 26, 1978]

IN THE CHANCERY COURT
STATE OF MISSISSIPPI
COUNTY OF JACKSON

RHEETA HASTY, a Minor, By and Through Her Mother and Next Friend, MRS. FAYE HASTY
Complainant

versus No. 26,697

LOUISVILLE & NASHVILLE RAILROAD COMPANY, a Kentucky Corporation, STEVE HAVARD, Individually and as Agent for Louisville & Nashville Railroad Company, and W. J. McRANEY, Station Agent for Louisville & Nashville Railroad Company
Defendants

ORDER

There coming on to be heard this day the motion of the Defendants to quash process and dismiss for lack of jurisdiction and the Court having been provided a stipulation of facts relating to the motion, and the Court, being fully advised in the premises, finds that the Court has jurisdiction and, therefore, the motion should be overruled.

It is therefore ordered that the motion of the Defendants to quash process and dismiss this cause for lack of jurisdiction be, and the same hereby is, overruled.

ORDERED This the 24th day of July, 1974.

/s/ KENNETH B. ROBERTSON
CHANCELLOR

ORDER

(Number and Title Omitted)

There coming on to be heard this day the motion of the Defendants, the Louisville and Nashville Railroad Company, Steve Havard and W. J. McRaney, for dismissal on the ground that a trial in Chancery Court without jury by way of attachment in this cause is in violation of Amendments V and XIV and Amendment VII of the United States Constitution and Article 3, Section 31 and Article 3, Section 14 of the Constitution of the State of Mississippi and the Court, being fully advised in the premises, finds that the motion should be, and is hereby overruled.

ORDERED this the 6th day of August, 1974.

/s/ KENNETH B. ROBERTSON
CHANCELLOR

DECREE OF JUDGMENT

(Number and Title Omitted)

This cause having come on for trial before the Court by Writ of Attachment for damages suffered by the Plaintiff, a minor, as a result of an accident between a vehicle in which she was a passenger and a train of the Defendant, Louisville & Nashville Railroad Company, and the Court, having heard said matter without a jury, jury trial having not been timely requested by the Plaintiff or the Defendants, the Court having heard testimony, both oral and by deposition, and having carefully considered same and the law applicable thereto, having written its Opinion in this matter and concluding that the Plaintiff, Rheeta Hasty, a minor, who brought suit by and through her Mother and Next Friend, Mrs. Faye Hasty, should recover judgment against the Defendants, Louisville and Nashville Railroad Company and Steve Havard, jointly, severally, collectively and individually, in the sum of $125,000.00, together with all costs.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff, Rheeta Hasty, a minor, by and through her Mother and Next Friend, Mrs. Faye Hasty, recover judgment of and from the Defendants,

Louisville and Nashville Railroad Company, a Kentucky Corporation, and Steve Havard, jointly, severally, collectively and individually, in the amount of $125,000.00 with interest at the rate of eight per cent per annum from the date of this judgment until finally paid, together with all costs which have accrued or shall accrue in this cause.

ORDERED, ADJUDGED AND DECREED, this the 17th day of February, 1976.

/s/ KENNETH B. ROBERTSON
CHANCELLOR

APPROVED AS TO FORM:
/s/ JOHN L. HUNTER
Attorney for Complainant
/s/ RAYMOND L. BROWN
Attorney for Defendants

MOTION FOR RE-HEARING OR NEW TRIAL

(Number and Title Omitted)

NOW COME the Defendants, the LOUISVILLE & NASHVILLE RAILROAD COMPANY and STEVE HAVARD, acting by and through their attorneys, and move this Honorable Court for re-hearing or a new trial, and in support thereof would show unto the Court as follows, to-wit:

I.

That the Court erred in overruling Motion of Defendants for dismissal for lack of jurisdiction in the Chancery Court.

II.

That the Court erred in overruling Motion for dismissal based on lack of the necessary grounds for an attachment in Chancery.

III.

That the Court erred in overruling Motion for dismissal on the grounds that the Plaintiff has an adequate remedy at law.

IV.

That the Court erred in overruling Motion of Defendants for a Jury trial in Chancery, after the Court had ruled that it would take jurisdiction of the matter in Chancery Court.

V.

That in denying the Defendants their right to be sued in the Circuit Court and in denying Jury trial, the Court was in error and violated the rights of these Defendants under Amendment VII of the Constitution of the United States and Amendment V and Amendment XIV of the Constitution of the United States; that such denial also violated the rights of these Defendants under Article III, Section 31 of the Constitution of the State of Mississippi and Article III, Section 14 of the Constitution of the State of Mississippi.

VI.

That the Opinion of the Court and the Decree of Judgment based thereon are contrary to the overwhelming weight of the evidence.

VII.

That the amount of the Judgment is excessive and cannot be cured by remittitur, but these Defendants contend that if re-hearing or new trial is not granted, a remittitur should be granted.

VIII.

That in arguments on the Motions made in this cause, the Court and counsel discussed and argued at length the issue of whether the Chancery Court has jurisdiction of this matter, in any event, because it involves a claim of a minor, and the Chancery Court, by statute, has jurisdiction in matters involving minors. It is assumed, therefore, that part, if not all, of the basis for the ruling by the Court taking jurisdiction of this matter is based upon the fact that it is a minor's claim, and, therefore, the Defendants contend that it was error for the Court to take jurisdiction of this cause on said basis.

Respectfully submitted,
LOUISVILLE & NASHVILLE RAILROAD COMPANY and STEVE HAVARD
BY: MEGEHEE, BROWN & WILLIAMS
/s/ RAYMOND L. BROWN
RAYMOND L. BROWN

[Dated: February 23, 1976]

ORDER

(Number and Title Omitted)

THERE COMING ON to be heard this day, the Motion for re-hearing, new trial or remittitur in the above styled and numbered cause, and the Court, being fully advised in the premises, finds that the Motion should be overruled.

IT IS, THEREFORE, ORDERED that the Motion for re-hearing, new trial or remittitur be, and it hereby is, overruled.

ORDERED this, the 24th day of February, A.D., 1976.

/s/ KENNETH B. ROBERTSON
CHANCELLOR

CHAPTER 31

MISSISSIPPI CODE, 1972

ATTACHMENT IN CHANCERY AGAINST NONRESIDENT, ABSENT OR ABSCONDING DEBTORS

§ 11-31-1 JURISDICTION; DEBTORS

The chancery court shall have jurisdiction of attachment suits based upon demands founded upon any indebtedness, whether the same be legal or equitable, or for the recovery of damages for the breach of any contract, express or implied, or arising ex delicto against any nonresident, absent or absconding debtor, who has lands and tenements within this state, or against any such debtor and persons in this state who have in their hands effects of, or are indebted to, such nonresident, absent or absconding debtor. The court shall give a decree in personam against such nonresident, absent or absconding debtor if summons has been personally served upon him, or if he has entered an appearance.

§ 11-31-3 HOW EFFECTS OR INDEBTEDNESS BOUND

When a bill shall be filed for an attachment of the effects of a nonresident, absent or absconding debtor in the hands of persons in this state, or of the indebtedness of the defendant in this state to such nonresident, absent or absconding debtor, it shall be sufficient to bind such effects or indebtedness, that the

summons for the defendant resident in this state shall have stated in or endorsed upon it the nature and object of the suit, and that it is to subject the effects in the hands of the resident defendant, and the indebtedness of such defendant to the non-resident, absent or absconding debtor, to the demand of the complainant; or, instead of such statement on the summons, a copy of the bill may be served with the summons, and shall bind the effects or indebtedness from the time of such service.

§ 11-31-5 HOW LAND LEVIED ON

If the land of the nonresident, absent or absconding debtor be the subject of such suit, a writ of attachment shall be issued, and shall be levied by the sheriff or other officer as such writs at law are required to be levied on land, and shall have like effect.

§ 11-31-7 WRITS OF SEQUESTRATION

Writs of sequestration may be issued for personal property in such cases as in others.

§ 11-31-9 PUBLICATION FOR DEFENDANT AND HIS APPEARANCE

The nonresident, absent or absconding debtor shall be made a party to such suit by publication of summons as in other cases, and may appear and plead, demur or answer, to the bill without giving security; but the lien of the creditor upon the property attached shall not be affected thereby unless security be given. If such debtor appear, he may give satisfactory security for performing the decree, and thereby discharge the lien, the court, or chancellor in vacation, approving the security and making an order to that effect; but if such debtor fail to appear, or fail to give security, the court shall have power to make any necessary orders, and to require security, to restrain the defendants within this state from paying, conveying away, or secreting the debts by them owing, or the effects in their hands belonging to, the nonresident, absent or absconding defendant, and may order such debts to be paid, or such effects to be delivered to the complainant, on his giving security for the return thereof in such manner as the court may direct.

§ 11-31-11 COMPLAINANT TO GIVE SECURITY AFTER DECREE

If a decree be rendered in such case without the appearance of the absent debtor, the court, before any proceedings to satisfy said decree, shall require the complainant to give security for abiding such further orders as may be made, for restoring of the estate or effects to the absent defendant, on his appearing and answering the bill within two years; and if the complainant shall not give such security, the effects shall remain under the direction of the court, in the hands of a receiver, or otherwise, for such time, and shall then be disposed of as the court may direct.

UNITED STATES CONSTITUTION — AMENDMENT XIV

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof,

are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction of the equal protection of the laws.

MISSISSIPPI CORPORATION LAWS

§ 79-1-23 Foreign Corporations may be domesticated — Charter to be recorded by Secretary of State

. . . Any corporation shall, upon compliance with this chapter, become to all intents and purposes a corporation of this state, and shall be entitled to all the rights and privileges and be subject to all the duties, obligations, restrictions, liabilities, limits and penalities conferred and imposed by laws of this state upon similar corporations incorporated under the laws of this state.

§ 79-1-25 Agent of domesticated foreign corporation upon whom process to be served

In any action against any foreign corporation becoming domesticated under the provisions of this chapter, process therein to be executed upon such corporations may be served upon the secretary of state or any agent of such corporation of this state, and such service of process shall be as effectual and shall have the same force and effect as if it had been served upon

the officers of domestic corporations, as provided by law, and the venue of such action shall be governed by the laws of this state relating to suits against corporations.

IN THE
CHANCERY COURT OF
JACKSON COUNTY, MISSISSIPPI

MRS. FAYE T. HASTY, INDIVIDUALLY, ROHONDA CAROL HASTY THOMPSON, INDIVIDUALLY, RICKY LYLE HASTY, INDIVIDUALLY, and RHEETA HASTY MARROW, A Minor, by and through her Next Friend, FRANKLIN MARROW, SR.
Complainants

versus No. 30,800

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, A Kentucky Corporation and STEVE HAVARD, Individually, and as Agent for LOUISVILLE AND NASHVILLE RAILROAD COMPANY, and W. J. McCRANEY, Individually, and as Agent for LOUISVILLE AND NASHVILLE RAILROAD COMPANY
Defendants

OPINION OF THE COURT

This matter is now before the Court on multiple Motions filed by the Defendants questioning the jurisdiction of this Court.

The Defendants again challenge the constitutionality of the attachment statute. The Court is urged to find that the case of *Mississippi Chemical Corporation v. Chemical Construction Corporation*, 444 F. Supp. 925 (S.D. Miss. 1977), has resolved the issue in their favor and that this Court is without jurisdiction in that the statutes are unconstitutional.

These issues were clearly presented and definitely resolved against the Defendants by the Mississippi Supreme Court in the companion case of *Rheeta Hasty vs. Louisville and Nashville Railroad Company, et al* (Supreme Court Cause No. 50,229). While the Supreme Court declined to consider the Mississippi Chemical case, it did note that the facts of that case appear to differ from the case before it. I agree.

In *Kron v. Vancleave*, 339 So. 2d 559, I attempted to strike down the immoral and unconscionable land tax sale redemption statute as unconstitutional. At page 563, the Supreme Court stated:

> "For the reasons stated this case is affirmed without reaching the constitutional question decided by the chancellor. *It is familiar learning that Courts will not decide a constitutional question unless it is necessary to do so in order to decide the case.* (Emphasis supplied.)

The present case certainly fails to meet the stated requirement.

The issues of there being a remedy at law and the request that a jury be impanelled were also resolved adverse to the Defendants in the Rheeta Hasty case.

The Defendants raise a new issue that the Defendant Steve Havard is before the Court by service through the "long arm" statute and not by way of attachment. It is argued that Chancery may have jurisdiction over the Defendant L&N through attachment, but cannot have jurisdiction over Havard since he was not brought into Court by attachment and since the "long arm" statute is not available to Chancery Court in a tort action.

This argument is interesting and demonstrates the thoroughness of a very competent attorney to fully represent his clients and leave no stone unturned, however, no law or logic is presented for the Court to so rule.

The issues of lack of jurisdiction on matters involving minors and transfer to Circuit Court may be considered together. These are the two real issues now before the Court.

In the Rheeta Hasty Opinion, *McLean v. Green*, 252 So. 2d 1312 (1977) was quoted in part as follows:

> "Despite the mandate of § 147, we look with disfavor upon and consider it an abuse of discretion for a chancellor to assume jurisdiction

of a common law action which properly should be tried in a court of law where the right to trial by jury remains inviolate."

Consideration of the present case has, with the full knowledge of all parties, been held in abeyance pending the outcome of the Rheeta Hasty appeal. It is now set for trial on the 20th of this month.

It could not possibly serve the ends of justice for this case to be transferred, all pleadings reformed and be placed at the end of what is well known to be a crowded and overburdened docket. The office of the new or third Circuit Judge does not take effect until the first of next year. If transferred, it is not probable to assume that this case could be heard this year.

Cognizant of the Rheeta Hasty and McLean cases, I must and do find that the Complainants have waited long enough for their day in Court and the balance of the testimony and evidence presented and I cannot now in good conscience force them to wait longer.

For the reasons stated, all Motions should be overruled.

The attorneys shall present an Order conforming to this Opinion.

RENDERED this the 13th day of September, A.D., 1978.

/s/ KENNETH B. ROBERTSON
KENNETH B. ROBERTSON
CHANCELLOR

ATTESTED
To be a true copy of original Opinion
filed September 13, 1978
Wilbur G. Dees, Chancery Clerk
Jackson County, Mississippi
/s/ AMELDA I. OWENS, D.C.

[Filed: Sep. 13, 1978]

ORDER

(Number and Title Omitted)

THERE COMING ON to be heard the motions of the Defendants questioning the jurisdiction of this Court, raising issues of constitutionality of the attachment statute requesting transfer to Circuit Court and, in the alternative, a jury trial in Chancery Court, and the Court, being fully advised in the premises, and in accordance with opinion rendered and filed September 13, 1978, in this cause, finds that the motions of the Defendants should be, and the same hereby are, overruled.

ORDERED THIS THE 14th day of September, 1978.

/s/ KENNETH B. ROBERTSON
Chancellor

ATTESTED
To be a true copy of original Order
filed Sept. 14, 1978
Wilbur G. Dees, Chancery Clerk
Jackson County, Mississippi
/s/ ADELINE DAJJETT, D.C.

[Filed: Sep. 14, 1978]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-598

LOUISVILLE & NASHVILLE RAILROAD COMPANY and STEVE HAVARD,
Petitioner,

versus

RHEETA HASTY, A Minor, By and Through Her Mother and Next Friend, MRS. FAYE HASTY,
Respondent.

REPLY BRIEF TO PETITION FOR A WRIT OF CERTIORARI

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INDEX

INDEX (Continued)

TABLE OF AUTHORITIES

CASES:

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-598

LOUISVILLE & NASHVILLE RAILROAD COMPANY and STEVE HAVARD,
Petitioner,

versus

RHEETA HASTY, A Minor, By and Through Her Mother and Next Friend, MRS. FAYE HASTY,
Respondent.

REPLY BRIEF TO PETITION FOR A WRIT OF CERTIORARI

JURISDICTION

Petitioners contend that this Court has jurisdiction to hear this matter based upon 28 USCA §1257(3). With this contention Respondent cannot agree. Title 28 USCA §1257(3) states:

> [f]inal judgments or decrees rendered by the highest court of a state in which a decision

> could be had, may be reviewed by the Supreme Court as follows: . . . . . (3) By Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in question or *where the validity of a state statute is drawn in question on the grounds of it being repugnant to the Constitution, treaties, or laws of the United States*, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States. [Emp. ours].

Respondent would show that the Petitioners failed to properly raise issues which would comply with this provision in order to establish jurisdiction. In addition, Title 28 USCA Supreme Court Rule 19 provides:

> 1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

Respondent contends that these provisions governing jurisdiction on Writ of Certiorari have not been met in the case presently before the Court. It becomes obvious when reviewing the Petition for Writ of Certiorari and its failure to comply with 28 USCA Supreme Court Rule 23(f), which requires:

> If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

Respondent would urge upon the Court that the orders which Petitioners seek to have reviewed have not been adjudicated by the highest court of the State

of Mississippi in such a manner as to properly raise these issues on Petition for Certiorari. This contention is based upon the fact that a timely raising of the constitutional issues must be made in order for the United States Supreme Court to consider the granting of a petition for certiorari. In *Hulbert v. City of Chicago*, 202 U.S. 275, 26 S. Ct. 617 (1906) the Court said that there must be a clear showing of the raising of a federal question which was decided upon by the state court before the United States Supreme Court would consider reviewing the issue. In that particular case the petitioner attempted to raise the constitutionality of an ordinance which provided for an assessment for a public improvement. Among the basis of appellant's objections were the following:

> "Said act concerning local improvements, passed June 14, 1897, and all amendments thereto, are not only contrary to the Constitution of Illinois, but they are also contrary to the Constitution of the United States and to the Fourteenth Amendment thereof.
>
> "Said act concerning local improvements, said ordinance, which is the basis of the present proceedings, and all documents and orders relating thereto are contrary to the Constitution of the United States and to the Fourteenth Amendment thereof, because such act, ordinance, document, and orders seek to deprive objector of property without due process of law.

> "Said ordinance and proceedings are in other respects illegal, unconstitutional, and void.
>
> "The proceedings herein and said act are contrary to the Constitution of the United States, and to the Fourteenth Amendment thereof, because the Petitioner herein, under and by virtue of said act and of said proceedings, seeks to deprive these objectors of their property without due process of law. Said proceedings and said act are also contrary to the Constitution of the United States, and to the Fourteenth Amendment thereof, for the reasons set forth in the several foregoing objections." 26 S. Ct. 617, 618.

It is submitted that the petitioners in this case failed to follow through on any constitutional objections and failed to raise same in such a specific way as was raised in the case of *Hulbert v. Chicago*, 202 U.S. 275, (See 1a-3a, 7a-9a, 17a-19a). In *Hulbert v. Chicago*, 202 U.S. 275, 26 S. Ct. 617, 618, the Court stated:

> The Bill of Exceptions shows that plaintiff in error did not bring to the attention of the trial court that the act of the state under which the assessment was made, or any of the proceedings were contrary to the Fourteenth Amendment to the Constitution of the United States, nor did he assign as error on appeal to the Supreme Court that the rulings of the trial court or its judgments infringed that

amendment. *Hulbert v. Chicago*, 202 U.S. 275, 26 S. Ct. 617, 618.

Petitioners in this case only attempted to raise an issue in reference to denial of jury trial in violation of Amendment VII of the Constitution of the United States and in violation of Amendments V and XIV of the Constitution of the United States (7a-9a). This motion which was filed the same day as Petitioners entered a general appearance in this cause by filing their answer was not ruled upon until subsequent to the filing of said answer to Bill of Attachment. In Petitioners' Motion for Rehearing, or a New Trial, again, the only constitutional issue raised had to do with the alleged right of a jury trial and, again, there was no mention of a violation of the Due Process or Equal Protection Clauses, nor an opportunity for the trial court to rule thereon. (17a-20a).

Petitioners now seek in the United States Supreme Court by their Petition for Writ of Certiorari to put the Chancery Court of Jackson County, Mississippi in error on issues upon which it was never given a reasonable opportunity to rule. They also attempt to put the Supreme Court of the State of Mississippi in error in reference to its "Due Process" argument, which was not raised in its Brief.

It has always been held that in order for the United States Supreme Court to consider a Constitutional issue, that said issue must have been necessary for the

decision reached from the highest state court below. See *Simmons v. West Haven Housing Authority*, 399 U.S. 510, 26 L. Ed. 2d 764, 90 S. Ct. 1960, reh den 400 U.S. 856, 27 L. Ed. 2d 94, 91 S. Ct. 23 (1970), and *Ellis v. Dixon*, 349 U.S. 458, 99 L. Ed. 1231, 75 S. Ct. 850 (1954). This principle has been variously stated, however, it should be noted that wherein the decision of the state's highest appellate court may rest on a non-federal ground that this Court has repeatedly declined to proceed upon.

It has also been held even in criminal cases in reference to appeals coming before the court that the issue as to sufficiency and propriety in raising a federal question is left to the sound discretion of the United States Supreme Court and that it would be presumed that when the highest state court failed to pass upon a federal question that the omission was due to want of proper presentation of the issue to the state courts, and that the burden was upon the petitioner to show otherwise. *Street v. New York*, 394 U.S. 576, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969).

This Court has also held that it will decline to review state court judgments which rest on independent or adequate state substantive or procedural grounds, even where those judgments also cited federal questions. *Henry v. State of Mississippi*, 379 U.S. 443, 13 L. Ed. 2d 408, 85 S. Ct. 564, reh den 380 U.S. 926, 13 L. Ed. 2d 813, 85 S. Ct. 878 (1965).

In the case at bar, it is submitted that the Motion to Dismiss filed in Chancery Court analogous with the date of the filing of an answer entering a general appearance was a procedure not recognized under Mississippi Chancery practice and that, therefore, the Constitutional issues of Due Process and Equal Protection were not properly raised. It is alternatively submitted that the Petitioners herein waived any Constitutional defects by proceeding to make their general appearance in the Chancery Court of Jackson County, Mississippi, without having a ruling on their Motion to Dismiss.

In the case of *Raley v. Ohio*, 360 U.S. 423, 3 L. Ed. 1344, 79 S. Ct. 1257 (1959), this court recognized in determining a jurisdictional question based upon its appellate jurisdiction that there must be "an explicit and timely insistence in the state courts that a state statute, *AS APPLIED*, is repugnant to the Federal Constitution, treaties, or laws" [Emp. ours], and "that the highest court of the state shall have passed on the federal Constitutional questions".

It is respectfully urged that the issues attempted to be raised before the United States Supreme Court by Petitioners herein were not previously raised as required.

SUPPLEMENTAL STATEMENT OF THE CASE

Petitioner, Louisville & Nashville Railroad Company, owns more than 29 miles of track in Jackson

County, Mississippi. The Petitioner, Louisville & Nashville Railroad Company, owns other real property other than that within its right of way and owns numerous items of personal property in Jackson County, Mississippi. The amount of property is valued in excess of the amount sued for in the original Complaint in this cause. Louisville & Nashville Railroad Company is a foreign corporation which has qualified to do business in the State of Mississippi with a local agent in charge of the Pascagoula, Jackson County, Mississippi, depot.

The accident for which this case was filed arose in Harrison County, which adjoins Jackson County, Mississippi. The Louisville & Nashville Railroad Company track which was attached herein crosses three counties in the southern part of Mississippi. The accident complained of occurred upon this same line of track.

Service was had upon the Petitioner, Louisville & Nashville Railroad Company, by personal service upon its local depot agent, W. J. McRaney. The record clearly shows that no assets of the Louisville & Nashville Railroad Company were ever confiscated by the Sheriff or other judicial official, and that no cash on hand or personal property was ever interfered with in any way in this cause. In addition, no property was taken, nor was Louisville & Nashville Railroad Company's free use thereof affected in any way. Louisville & Nashville Railroad Company continued to operate just as they had before the filing of this lawsuit.

Petitioners also contend in their Statement of Facts that they complained of denials of Equal Protection and Due Process by filing a motion in the Chancery Court of Jackson County, Mississippi, attacking the jurisdiction. Petitioners initially did not raise any violation of the United States Constitution in reference to the Due Process or Equal Protection Clauses, but objected to the jurisdiction of the court by virtue of a Motion to Quash Process and Attempted Attachment and to Dismiss Bill for Want of Jurisdiction (1a-5a) based upon the following allegations:

> That the Defendant, Louisville & Nashville Railroad Company, owns and maintains property in Jackson County, Mississippi, valued in excess of the amount sued for in the Bill of Complaint.
>
> That the Defendant is qualified to do business in the State of Mississippi and has a registered agent for service of process in the state, as well as a local agent in charge of the Pascagoula, Mississippi office, either of whom may receive process which would lead to a valid *in personam* judgment against the Defendant if a judgment were obtained.

The Petitioners further pleaded that they were being denied the right of a jury trial but initially raised no Constitutional argument in reference thereto.

Subsequently, the Petitioners filed a Motion to Dismiss (7a-9a) — a procedure not recognized under the State Practice in Mississippi in either Chancery or Circuit Courts. In this motion they attempted to raise the denial of the right of trial by jury in violation of Amendment VII of the Constitution of the United States and in violation of Amendments V and XIV of the Constitution of the United States. In addition, they raised issues as to the violation of provisions of the Mississippi Constitution, which the Supreme Court of Mississippi decided adversely to the Petitioners herein.

On July 31, 1974, the same day that the alleged Motion to Dismiss was filed, Petitioners also filed an Answer to Bill of Attachment (10a-15a), which was a general appearance in the Chancery Court and thereby submitted themselves to the Chancery Court in personam. The Motion to Dismiss was not ruled on until August 6, 1974.

Petitioners also state that they raised the Due Process and Equal Protection arguments in their Motion for a New Trial (17a-20a). Again, the only Federal Constitutional issues which were raised were stated thusly:

> That in denying the Defendant their right to be sued in the Circuit Court and in denying the jury trial, the Court was in error and violated the rights of these Defendants under Amendment VII of the Constitution of the

United States and Amendment V and Amendment XIV of the Constitution of the United States . . . . .

Therefore, the issues of denial of Due Process and Equal Protection were not specifically raised at this point in time.

It was not until the Brief and Assignment of Errors were filed before the Mississippi Supreme Court that the Equal Protection argument was specifically raised. The "Due Process" argument was not even raised in the Brief filed in the Mississippi Supreme Court (see footnote 1, page 3a of the Appendix of the Petition for a Writ of Certiorari).

REASONS FOR DENYING THE WRIT

I.

Certiorari Should Be Denied Since The Statutes Do Not Violate Due Process On Their Face And As Applied Here And That The Decision Below Is Not Contrary To Applicable United States Supreme Court And Lower Federal Court Decisions.

Petitioners apparently place much reliance on the case of *Shaffer v. Heitner*, 433 U.S. 186, 97 S. Ct. 2569 (1977), which dismissed a suit arising under the Delaware Attachment Statute. The basis of that holding, however, was that the Defendant therein failed to have significant contact with the State of Delaware so as to be subject to *quasi in rem* jurisdiction in that state

based upon its failure to satisfy the "Minimum Contacts" principle enumerated in *International Shoe v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 98 L. Ed. 95 (1945).

In the case at bar the evidence is undisputed that the Louisville & Nashville Railroad Company owned land within Jackson County, Mississippi; operated a railroad through said county, as well as Harrison and Hancock counties in Mississippi; and had no less than 29 miles of track in Jackson County, Mississippi; and that the accident complained of in the subject suit occurred while operating a train on the same line of track which is in question and which was the subject of the attachment. No legitimate argument can be made that the Louisville & Nashville Railroad Company did not have "Minimum Contacts", as was the case in *Shaffer*, supra. Even under the most restrictive view of *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 98 L. Ed. 95 (1945), the Louisville & Nashville Railroad Company had subjected itself to the jurisdiction of the Chancery Court of Jackson County, Mississippi, and was doing a substantial amount of business in this jurisdiction. *Shaffer*, supra, did not hold Delaware's attachment statutes unconstitutional, per se, but in effect held that they were violative of the Due Process Clause of the United States Constitution as applied to the defendants, based upon their failure to have "minimum contacts" with the state. It is also apparent that the Petitioners did not bother to review the procedures authorized under Delaware law in ref-

erence to Attachment in Chancery. These statutes are very dissimilar to those applied under Mississippi's Attachment in Chancery.

In the case at bar there has been absolutely no showing that the Attachment in Chancery statute as applied in this case denied anyone of any substantial property right or caused any deprivation thereof so as to activate the Due Process Clause of the Constitution of the United States.

The property attached in this case constituted real estate which was located in Jackson County, Mississippi and which had been owned by the Louisville & Nashville Railroad Company for many years. None of the cases cited by Petitioners involve real property, but rather personalty. The right to attach such property of non-residents has been recognized since *Pennoyer v. Neff*, 5 Otto 714, 95 U.S. 714, 24 L. Ed. 565, (1877). This remains the law today.

Two of the justices, Mr. Justice POWELL and Mr. Justice STEVENS, both of whom concurred in opinion in *Shaffer v. Heitner*, 433 U.S. 186, 97 S. Ct. 2569, 2587-2588, (1977), observed that real property probably should be handled in a different manner than personalty. Mr. Justice POWELL stated:

> I would explicitly reserve judgment, however, on whether the ownership of some forms of property whose situs is indisputably and permanently located within a State may, without more, provide the contacts necessary to subject a defendant to jurisdiction within the State to the extent of the value of the property. In the case of real property, in particular, preservation of the common law concept of *quasi in rem* jurisdiction arguably would avoid the uncertainty of the general *International Shoe* standard without significant cost to " 'traditional notions of fair play and substantial justice.' " [*International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158] . . . , quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S. Ct. 339, 343, 85 L. Ed. 278 (1940). 97 S. Ct. 2569, 2587.

Mr. Justice STEVENS, while concurring in the result in *Shaffer*, supra, said:

> I agree with Mr. Justice POWELL that it should not be read to invalidate *in rem* jurisdiction where real estate is involved. 97 S. Ct. 2588.

Petitioners also rely upon the cases of *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983 (1972), and *Sniadich v. Family Finance Corp.*, 395 U.S. 337, 89 S. Ct. 1820 (1969), as upholding their position that they were denied procedural due process. In order to properly evaluate these cases in view of the case at bar, it is necessary to look specifically at the facts of each case in reference to

its application to the Due Process Clause of the Fourteenth Amendment. In the *Fuentes* case, supra, the Plaintiffs were attempting to repossess property from Defendants; therefore, there can be no question that they were being deprived of personal property. This is not the situation of the case at bar. As pointed out previously, there was no substantial interference with the property of the Defendant, Louisville & Nashville Railroad Company, either personal or real.

In *Sniadich v. Family Finance Corp.*, 395 U.S. 337, 89 S. Ct. 1820 (1969), the petitioner had actually had her salary garnished and her wages frozen. Again, there was a substantial interference with a valid property right. The Court in that case stated

> A procedural rule that may satisfy due process for attachments in general, see *McKay v. McInnes*, 279 U.S. 820, 49 S. Ct. 344, 73 L. Ed. 975, does not necessarily satisfy procedural due process in every case. The fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms. We deal here with wages — a specialized type of property presenting distinct problems in our economic system. We turn then to the nature of that property and problems of procedural due process.
>
> A prejudgment garnishment of the Wisconsin type is a taking which may impose tremendous hardship on wage earners with families to support. 89 S. Ct. 1822.

The Court went on to say:

> The result is that a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall. Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing . . . this prejudgment garnishment procedure violates the fundamental principles of due process. 89 S. Ct. 1822, 1823 (1969).

Again, it should be pointed out that there has been no substantial deprivation of any property rights of the Petitioners in the case before the bar.

Petitioners also urge upon the Court the case *Mississippi Chemical Corporation v. Chemical Construction Corporation*, 444 F. Supp. 925 (1977), as holding Mississippi's Chancery Court Attachment Procedures as being violative of procedural due process. It should be pointed out, however, that the holding of that case was also limited to the facts before that court. 444 F. Supp. 925, 943-944.

In *Mississippi Chemical Corporation v. Chemical Construction Corporation*, supra, the funds attached were not at-

tributal to contracts to be performed in the State of Mississippi or to debts arising in this state; contrarily, all involved activity outside of the jurisdiction of the State of Mississippi. In addition, huge sums of money owing under the provisions of those contracts were tied up, and this constituted significant deprivation of a property right without question — a condition, again, not applicable to the case at bar.

It is, therefore, respectfully urged that not only do the Petitioners fail to properly raise any Constitutional issues in reference to the Due Process Clause of the United States Constitution, but that it has wholly failed to show that there has been a deprivation of any rights as the allegedly "unconstitutional" statutes are applied to it. It is, therefore, respectfully urged that this Honorable Court should decline to grant Certiorari based upon an alleged denial of due process

II.

Certiorari Should Be Denied Because The Statutes As Applied Do Not Deny Equal Protection Of The Laws To Petitioners.

Respondent, without re-enumerating the jurisdictional deficiencies of the Petition for a Writ of Certiorari, again would incorporate its previous authority in response to whether Certiorari should be granted to consider whether or not Mississippi's Attachment in Chancery as applied to the Petitioners constituted a denial of equal protection of the laws.

In construing the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, this Court has traditionally held that the rational basis standard of equal protection analysis is a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create a distinction is peculiarly a legislative test and an unavoidable one, and that under such standards perfection is not necessary and such classifications are presumed valid. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 96 S. Ct. 2562, 49 L. Ed.2d 520 (1976). The only exception to this rule is when a suspect category, such as Civil is involved and then a higher standard is required in order to uphold statutes which create a distinction in classifications. It is, therefore, respectfully urged that if there is a reasonable basis to distinguish the Attachment in Chancery statute as applied to Louisville & Nashville Railroad Company, that such a statute should not be overthrown on the basis of violating the Equal Protection Clause of the United States Constitution. Section 11-31-1, Mississippi Code of 1972, Annotated (17a of Petitioners' Brief) applies an Attachment in Chancery jurisdiction to "any non-resident, absent or absconding debtor who has lands and tenements within this state . . .".

Therefore, the question is whether a non-resident domesticated corporation should be treated differently from a corporation organized and existing under the laws of the State of Mississippi. It should be noted that §11-31-1, Mississippi Code of 1972, Annotated,

provides this remedy against any non-resident, absent or absconding debtor; these three categories were obviously designated because the legislature was of the opinion that the citizens of the State of Mississippi should be given additional protection against these particular classes for the reason that they had less substantial contacts within the state or were attempting to avoid the jurisdiction of the courts of this state to settle a dispute.

There can be no question that the non-resident provision or class would be applied with equality toward a corporation and toward an individual. Of course, this statute would be subject to there being sufficient minimal contacts as recognized in *Shaffer v. Heitner*, 433 U.S. 186, 97 S. Ct. 2569 (1977). Therefore, the sole question is whether or not the legislature of the State of Mississippi, in order to protect its citizens, may provide a remedy to be exercised against non-residents which is different from the remedy which would be exercised against resident citizens without offending the Equal Protection Clause of the United States Constitution. In other words, is there a rational basis to distinguish non-resident domesticated corporations (such as your Petitioners herein) and domestic corporations?

In *Southern Motor Express Co. v. Magee Truck Lines, Inc.*, 177 So. 653 (1937), the appellant attempted to argue that a non-resident domesticated corporation should be treated identically with a domestic corporation for

purposes of the attachment statute. The Court, rejecting that argument, observed:

> Whatever may be the full import of the domestication statutes, we think it may be safely said that they do not operate to make two separate and distinct corporations. The foreign corporation domesticated here still remains one corporation, and it must, therefore, have its domiciliary residence in one state and not in both. Thus, it seems the more reasonable to ascribe that residence to the original state which above others has *visitorial and supervisory powers over it as well as the final authority to dissolve it.* [Emp. ours].

The Court went on to observe that:

> Under the ruling of the Supreme Court of the United States in *Southern Ry. Co. v. Allison*, 190 U.S. 326, 23 S. Ct. 713, 47 L. Ed. 1078, ... that a domesticated foreign corporation may remove to the federal court an action brought in the state of the domestication on the ground that it is a resident of the state of its original incorporation. 177 So. 653 (1937).

In *Southern Motor Express Co.*, supra, the Court went on to hold that to allow a domesticated corporation to claim, it should be treated identically with a domestic corporation would permit a removal by the domesticated cor-

poration in a suit brought in excess of the jurisdictional amount for diversity and would allow, on the other hand, a suit brought for a lesser amount to be dismissed on the basis that the attachment of a resident would not lie. Therefore, the issue is whether or not the visitorial, supervisory, and the final authority to dissolve a corporation can constitute a reasonable basis of distinction so as to not breach the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

It is respectfully submitted that such a distinction is not only permissible but has a valid basis in the case presently before the Court, in that the purpose of the Attachment in Chancery Statutes in Mississippi was to give citizens of this state additional protection from non-resident corporations where the State of Mississippi has no visitorial and supervisory powers over it. It is respectfully urged that such a distinction has a rational basis and, therefore, does not infringe on the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

III.

Certiorari Should Be Denied Because There Is No Constitutional Right To A Jury Trial In A Civil Suit In A State Court In Mississippi In Instances Such As This, Nor Under The Seventh Amendment Of The United States Constitution.

The Supreme Court of Mississippi in its opinion in this case, *Louisville & Nashville Railroad Co., et al v. Rheeta Hasty,* 360 So. 2d 925 (1978), adequately stated the prevailing state law in that regard. The Court stated:

> Appellant next contends that its constitutional right to a jury trial was violated by the Chancery Court in taking jurisdiction of this case. However, this issue has previously been decided adversely to Appellant and the appellant has not advanced any arguments which would persuade us to overrule those cases. See *Illinois Central Railroad Co. v. McDaniel,* 246 Miss. 600, 151 So. 2d 805 (1963); *Matthews v. Thompson,* 231 Miss. 258, 95 So. 2d 438 (1957); *Talbot & Higgins Lumber Company v. McLeod Lumber Co.,* 147 Miss. 186, 113 So. 433 (1927).

Petitioners' further contention that the taking of jurisdiction by the Chancery Court of Jackson County, Mississippi, denied it due process is also contrary to the prior holdings of this Court which do not apply the Seventh Amendment of the Constitution to state court proceedings. In the case *Olesen v. Trust Company of Chicago,* 245 F. 2d 522 (7th Cir. 1957), the Court sustained a Motion to Dismiss based on the fact that there was no federal question when appellant attempted to raise constitutional grounds that she had been denied a right to a jury trial as guaranteed under the Seventh Amendment of the United States Constitution. The Court held:

It is clear there is no federal question involved in the case at bar. The Seventh Amendment of the United States Constitution applies to trials in the United States courts. Citing *Bute v. People of State of Illinois,* 333 U.S. 640, 657 (footnote), 68 S. Ct. 763, 92 L. Ed. 986.

Trial by jury in civil actions in state courts may be modified by a state or abolished altogether. *Walker v. Sauvinet,* 92 U.S. 90, 23 L. Ed. 678; *Maxwell v. Dow,* 176 U.S. 581, 20 S. Ct. 494, 44 L. Ed. 597; *New York Central Railroad Company v. White,* 243 U.S. 188, 208, 37 S. Ct. 247, 61 L. Ed. 667; *Wagner Electric Manufacturing Company v. Lyndon,* 262 U.S. 226, 232, 43 S. Ct. 589, 67 L. Ed. 961.

A denial of trial by jury in a state court is not a denial of due process of law under the Fourteenth Amendment. "The Fourteenth Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure." *Hardware Dealers' Mutual Fire Insurance Company of Wisconsin v. Glidden Co.,* 284 U.S. 151, 158, 52 S. Ct. 69, 71, 76 L. Ed. 214.
Olesen v. Trust Company of Chicago, 245 F. 2d 522 (7th Cir. 1957).

It is also likewise contrary to Petitioners' contention that the denial of a jury trial violated the Equal Protection Clause since it is clear that others similarly situated to which the Attachment in Chancery Statute

would be applicable could likewise be denied trial by jury in the state proceedings.

CONCLUSION

Respondent, therefore, respectfully contends that the Petitioners herein have wholly failed to raise constitutional questions in reference to denial of due process and equal protection under the facts in this case and, further, have wholly failed to substantiate their claim that this petition requesting certiorari should be granted since there has been no denial of their rights or equal protection and due process as the Attachment statute has been applied. It is, therefore, respectfully submitted that this petition should be denied.

Respectfully submitted,

JOHN L. HUNTER
Attorney for RHEETA HASTY, a Minor, by and Through her Mother and Next Friend, MRS. FAYE HASTY, RESPONDENT

CUMBEST AND CUMBEST, P.A.
Attorneys for Respondent
Post Office Drawer 1287
Pascagoula, Mississippi 39567

Telephone: (601) 762-5422

CERTIFICATE OF SERVICE

I, JOHN L. HUNTER, attorney of record for the Respondent, Rheeta Hasty, a Minor, by and through her Mother and Next Friend, Mrs. Faye Hasty, do hereby certify that I have mailed this day, by United States mail, postage prepaid, three (3) true and correct copies of the foregoing printed Reply Brief to Petition for A Writ of Certiorari to the Supreme Court of Mississippi to Honorable Raymond L. Brown, attorney of record for Petitioners, addressed to his usual business mailing address of: Megehee, Brown & Williams, P.A., Post Office Box 787, Pascagoula, Mississippi 39567.

THIS, the ____ day of November, 1978.

_____

JOHN L. HUNTER

APPENDIX

IN THE CHANCERY COURT
STATE OF MISSISSIPPI
COUNTY OF JACKSON

NO. 26,697

RHEETA HASTY, a Minor, By and Through Her Mother and Next Friend, Mrs. Faye Hasty,
Complainant,

versus

LOUISVILLE & NASHVILLE RAILROAD COMPANY, a Kentucky Corporation, STEVE HAVARD, Individually and as Agent for Louisville & Nashville Railroad Company, and W. J. McRANEY, Station Agent for Louisville & Nashville Railroad Company,
Defendants.

MOTION TO QUASH PROCESS AND ATTEMPTED ATTACHMENT AND DISMISS BILL FOR WANT OF JURISDICTION

Now come the Louisville & Nashville Railroad Company, Steve Havard and W. J. McRaney, acting by and through their attorneys, and make a special appearance, solely for the purpose of this motion and limited thereto, and move this Honorable Court to

Quash Process in this attempted attachment proceeding and dismiss the Bill for want of jurisdiction, and in support thereof would show unto the Court as follows, to-wit:

I.

That the Defendant, Louisville & Nashville Railroad Company owns and maintains property in Jackson County, Mississippi, valued in excess of the amount sued for in the Bill of Complaint.

II.

That the Defendant, Louisville & Nashville Railroad Company, is qualified to do business in the State of Mississippi and has a registered agent for service of process in the State of Mississippi, as well as a local agent in charge of the Pascagoula, Mississippi office, either of whom may receive process which would lead to a valid *in personam* judgment against the Defendant if a judgment were obtained.

III.

That the Defendant, the Louisville & Nashville Railroad Company, is not an absent or absconding debtor, nor are the other defendants, nor are they alleged to be; the only allegation being that the defendant is a non-resident but, as stated in Paragraph II above, the Louisville & Nashville Railroad Company has

become domesticated, and the other individual defendants can be served in the Circuit Court under proper statutes of the State of Mississippi.

IV.

That the Defendants are entitled to a jury trial on a personal injury claim in tort for unliquidated damages, and the procedure sought by the Complainant would deny such jury trial.

V.

That only the Louisville and Nashville Railroad Company and two of its employees are defendants in this suit, and no other person or party who holds property or assets or owes a debt to any of the defendants is named a party to this suit.

VI.

That the Chancery Court lacks jurisdiction in this matter for the foregoing reasons.

Respectfully submitted,

LOUISVILLE & NASHVILLE RAILROAD COMPANY, STEVE HAVARD and W. J. McRANEY

BY: MEGEHEE, BROWN, WILLIAMS & CORLEW

/s/ RAYMOND L. BROWN

RAYMOND L. BROWN

MEGEHEE, BROWN, WILLIAMS & CORLEW
Post Office Box 787
Pascagoula, Mississippi 39567
Phone: (601) 762-2271

STATE OF MISSISSIPPI
COUNTY OF JACKSON

Personally appeared before me, the undersigned authority in and for said county and state, RAYMOND L. BROWN, who stated to me on oath that he is Attorney of Record for the Defendants, Louisville & Nashville Railroad Company, Steve Havard and W. J. McRaney, that he is informed and believes that the matters and things alleged in this motion are true and correct as therein stated.

/s/ RAYMOND L. BROWN
RAYMOND L. BROWN

Sworn to and subscribed before me, this the 24th day of July, 1974.

/s/ SAMMY M. BERNARD
NOTARY PUBLIC

CERTIFICATE

I, RAYMOND L. BROWN, Attorney of Record for the Defendants in the foregoing cause of action, do hereby certify that I have this date mailed by U. S. Mail, postage prepaid, a true and correct copy of the foregoing Motion to the Attorney of Record for the Plaintiff, John Hunter, Esquire, at his regular post office address, which is Post Office Box 1287, Pascagoula, Mississippi 39567.

This the 24th day of July, 1974.

/s/ RAYMOND L. BROWN
RAYMOND L. BROWN

STIPULATION

(Number and Title Omitted)

It is hereby agreed by and between counsel that the Motion to Quash Process and Attempted Attachment and Dismiss Bill for Want of Jurisdiction may be ruled upon by the Court upon stipulated facts hereby submitted and approved by counsel for Complainant.

That the parties stipulate the following facts, to-wit:

I.

That the Defendant, the Louisville & Nashville Railroad Company, owns more than 24 miles of right-of-way and more than 29 miles of track in Jackson County, Mississippi.

II.

That the Defendant, the Louisville & Nashville Railroad Company, owns real property other than that within its right-of-way and owns numerous items of personal property in Jackson County, Mississippi.

III.

That the foregoing property is of a value in excess of the damages claimed in this suit.

IV.

That the Louisville and Nashville Railroad Company is a foreign corporation qualified to do business in the State of Mississippi, with a registered agent for process appointed and with a local agent in charge of the Pascagoula, Jackson County, Mississippi, depot.

Respectfully submitted,

LOUISVILLE & NASHVILLE
RAILROAD COMPANY,
STEVE HAVARD and
W. J. McRANEY
BY: MEGEHEE, BROWN,
WILLIAMS & CORLEW
/s/ RAYMOND L. BROWN

MEGEHEE, BROWN, WILLIAMS & CORLEW
Post Office Box 787
Pascagoula, Mississippi 39567
Phone: (601) 762-2271

AGREED STIPULATION:

/s/ JOHN L. HUNTER
John Hunter,
Attorney for Plaintiff

MOTION TO DISMISS

(Number and Title Omitted)

Filed: Jul. 31, 1974

Now come the Defendants, LOUISVILLE & NASHVILLE RAILROAD, STEVE HAVARD and W. J. McRANEY, and move this Court for dismissal of the above styled and numbered cause for the following reasons, to-wit:

That to proceed with this matter in Chancery Court of Jackson County, Mississippi, when all of these Defendants are properly subject to process in the Circuit Court of Jackson County, Mississippi, would be a denial of the right of trial by jury in violation of Amendment VII of the Constitution of the United States and

in violation of Amendments V and XIV of the Constitution of the United States.

That to proceed with this matter in Chancery Court of Jackson County, Mississippi, when all of these Defendants are properly subject to process in the Circuit Court of Jackson County, Mississippi, would be a denial of the right of trial by jury in violation of Article 3, Section 31 of the Constitution of the State of Mississippi and Article 3, Section 14 of the Constitution of the State of Mississippi.

Respectfully submitted,

LOUISVILLE & NASHVILLE RAILROAD COMPANY, STEVE HAVARD and W. J. McRANEY

BY: MEGEHEE, BROWN, WILLIAMS & CORLEW

/s/ RAYMOND L. BROWN
RAYMOND L. BROWN

STATE OF MISSISSIPPI
COUNTY OF JACKSON

Personally appeared before me, the undersigned authority in and for said county and state, RAYMOND L. BROWN, who stated to me on oath that he is Attorney of Record for the Defendants, Louisville & Nashville Railroad Company, Steve Havard and W. J. McRaney, that he is informed and believes that the

matters and things alleged in this motion are true and correct as therein stated.

/s/ RAYMOND L. BROWN
RAYMOND L. BROWN

Sworn to and subscribed before me, this the 31st day of July, 1974.

/s/ MARILYN B. GUARDIA
NOTARY PUBLIC

RAYMOND L. BROWN
MEGEHEE, BROWN, WILLIAMS & CORLEW
Post Office Box 787
Pascagoula, Mississippi 39567

CERTIFICATE

I, RAYMOND L. BROWN, Attorney of Record for the Defendants in the foregoing cause of action, do hereby certify that I have this date personally delivered a true and correct copy of the foregoing Motion to the Attorney of Record for the Plaintiff, John Hunter, Esquire, at his offices at 707 Watts Avenue, Pascagoula, Mississippi 39567.

This the 31st day of July, 1974.

/s/ RAYMOND L. BROWN
RAYMOND L. BROWN

ANSWER TO BILL OF ATTACHMENT

(Number and Title Omitted)

Filed: Jul. 31, 1974

TO THE HONORABLE CHANCERY COURT OF JACKSON COUNTY, MISSISSIPPI:

Now come the Defendant, the Louisville & Nashville Railroad Company, Steve Havard, and W. J. McRaney, and in answer to the bill of attachment filed against them in this cause, would state and show unto the Court as follows, to-wit:

1.

Defendants admit the allegations of paragraph 1.

2.

Defendants admit the allegations of paragraph 2, and, further answering, say that the Defendant, Louisville & Nashville Railroad Company, is qualified to do business in the State of Mississippi and is in fact doing business in the State of Mississippi.

3.

Defendants admit that the Defendant, Louisville & Nashville Railroad Company, owns the property described in paragraph 3, but denies that the property described, or any of same, is under the care, custody

and control of W. J. McRaney, the said W. J. McRaney being an employee of the Louisville & Nashville Railroad Company, and said property being in the custody of the Louisville & Nashville Railroad Company, the said W. J. McRaney having no authority whatsoever to sell, lease, dispose of, or in any way deal with said property, except, as is the case with all employees, to protect railroad property from loss or damage.

4.

Defendants admit the allegations of ownership in paragraph 4, admit that the property of the railroad is subject to attachment in order to satisfy a valid judgment rendered against any or all of the Defendants, but denies that this Court, under the circumstances of this case, has jurisdiction to attach any of these Defendants, or their property, for purposes of acquiring jurisdiction herein.

5.

The Defendants admit the allegations as to the date and place of the accident complained of, but would deny the other allegations of paragraph 5.

6.

Defendants deny the allegations of paragraph 6, and more specifically denying that said crossing was hazardous and dangerous and that the Defendant or its operators were required to approach said crossing with the exercise of extreme caution and care.

7.

Defendants deny the allegations of paragraph 7.

8.

Defendants deny the allegations of paragraph 8.

9.

Defendants deny the allegations of paragraph 9.

10.

Defendants deny the allegations of paragraph 10.

11.

Defendants deny the allegations of negligence in paragraph 11, and, as to the injuries, these Defendants are without knowledge or information upon which to base an admission or denial of the various allegations, and, therefore, deny same and demand strict proof thereof.

12.

Defendants deny the allegations of paragraph 12.

13.

Defendants deny that an attachment of the property of any of these Defendants will lie in this cause and deny that writs of garnishment and attachment should issue herein; Defendants deny that judgment should be granted against any of these Defendants in any amount

whatsoever, and deny that the Plaintiff is entitled to any relief whatsoever from these Defendants in this cause.

AFFIRMATIVE DEFENSES

I.

And now, having fully answered the Bill of Attachment filed against them in this cause, the Defendants give notice that they intend to prove that the sole, proximate cause of the accident and injuries complained of was the negligence of the driver of the vehicle in which the Plaintiff, Rheeta Hasty, was riding as a passenger.

II.

That said negligence consisted of the following acts or omissions, to-wit:

A. Failure to stop, look and listen before proceeding upon the tracks as required by law.

B. Failure to keep a reasonable and proper lookout.

C. Failure to heed and obey a city stop sign at or near the crossing.

D. Failure to heed or obey a railroad stop sign at or near the crossing.

E. Failure to heed warnings emitted by the train.

F. Failure to exercise reasonable care and caution.

And now, having fully answered the Bill of Attachment filed herein, and having set forth Affirmative Defenses, the Defendants move to be dismissed with their reasonable costs expended.

Respectfully submitted,

LOUISVILLE & NASHVILLE RAILROAD COMPANY, STEVE HAVARD and W. J. McRANEY

BY: MEGEHEE, BROWN, WILLIAMS & CORLEW

/s/ RAYMOND L. BROWN
RAYMOND L. BROWN

STATE OF MISSISSIPPI
COUNTY OF JACKSON

Personally appeared before me, the undersigned authority in and for said county and state, RAYMOND L. BROWN, who stated to me on oath that he is Attorney of Record for the Defendants, Louisville & Nashville Railroad Company, Steve Havard and W. J. McRaney, and that he signed the above and foregoing Answer for and on behalf of said Defendants as their attorney, and that said Answer and the allegations contained therein are true and correct as therein stated ac-

cording to information and belief of the said Raymond L. Brown.

/s/ RAYMOND L. BROWN
RAYMOND L. BROWN

Sworn to and subscribed before me this the 31st day of July, 1974.

/s/ MARILYN B. GUARDIA
NOTARY PUBLIC

RAYMOND L. BROWN
MEGEHEE, BROWN, WILLIAMS & CORLEW
Post Office Box 787
Pascagoula, Mississippi 39567

CERTIFICATE

I, RAYMOND L. BROWN, Attorney of Record for the Defendants in the foregoing cause of action, do hereby certify that I have this date personally delivered a true and correct copy of the foregoing Answer to the Attorney of Record for the Plaintiff, John Hunter, Esquire, at his offices at 707 Watts Avenue, Pascagoula, Mississippi 39567.

This the 31st day of July, 1974.

/s/ RAYMOND L. BROWN
RAYMOND L. BROWN

ORDER

(Number and Title Omitted)

Filed: Aug. 6, 1974

There coming on to be heard this day the motion of the Defendants, the Louisville and Nashville Railroad Company, Steve Havard and W. J. McRaney, for dismissal on the ground that a trial in Chancery Court without jury by way of attachment in this cause is in violation of Amendments V and XIV and Amendment VII of the United States Constitution and Article 3, Section 31 and Article 3, Section 14 of the Constitution of the State of Mississippi and the Court, being fully advised in the premises, finds that the motion should be, and is hereby overruled.

ORDERED this the 6th day of August, 1974.

/s/ KENNETH B. ROBERTSON
CHANCELLOR

MOTION FOR RE-HEARING OR NEW TRIAL

(Number and Title Omitted)

Filed: Feb. 23, 1976

NOW COME the Defendants, the LOUISVILLE & NASHVILLE RAILROAD COMPANY and STEVE HAVARD, acting by and through their attorneys, and move this Honorable Court for re-hearing or a new trial, and in support thereof would show unto the Court as follows, to-wit:

I.

That the Court erred in overruling Motion of Defendants for dismissal for lack of jurisdiction in the Chancery Court.

II.

That the Court erred in overruling Motion for dismissal based on lack of the necessary grounds for an attachment in Chancery.

III.

That the Court erred in overruling Motion for dismissal on the grounds that the Plaintiff has an adequate remedy at law.

IV.

That the Court erred in overruling Motion of Defendants for a Jury trial in Chancery, after the Court had ruled that it would take jurisdiction of the matter in Chancery Court.

V.

That in denying the Defendants their right to be sued in the Circuit Court and in denying Jury trial, the Court was in error and violated the right of these Defendants under Amendment VII of the Constitution of the United States and Amendment V and Amendment XIV of the Constitution of the United States; that such denial also violated the rights of these Defendants under Article III, Section 31 of the Constitution of the State of Mississippi and Article III, Section 14 of the Constitution of the State of Mississippi.

VI.

That the Opinion of the Court and the Decree of Judgment based thereon are contrary to the overwhelming weight of the evidence.

VII.

That the amount of the Judgment is excessive and cannot be cured by remittitur, but these Defendants contend that if rehearing or new trial is not granted, a remittitur should be granted.

VIII.

That in arguments on the Motions made in this cause, the Court and counsel discussed and argued at length the issue of whether the Chancery Court has jurisdiction of this matter, in any event, because it involves a claim of a minor, and the Chancery Court, by statute, has jurisdiction in matters involving minors. It is assumed, therefore, that part, if not all, of the basis for the ruling by the Court taking jurisdiction of this matter is based upon the fact that it is a minor's claim, and, therefore, the Defendants contend that it was error for the Court to take jurisdiction of this cause on said basis.

Respectfully submitted,

LOUISVILLE & NASHVILLE RAILROAD COMPANY and STEVE HAVARD

BY: MEGEHEE, BROWN & WILLIAMS

/s/ Raymond L. Brown

RAYMOND L. BROWN

CERTIFICATE

I, RAYMOND L. BROWN, attorney of record for the Defendants, Louisville & Nashville Railroad Company and Steve Havard, do hereby certify that I have this day mailed by United States Mail, postage prepaid, a true and correct copy of the foregoing Motion for Rehearing or New Trial to John L. Hunter, attorney of record for the Complainant, at his usual business address of Post Office Box 1287, Pascagoula, Mississippi 39567.

THIS, the 23rd day of February, 1976.

/s/ Raymond L. Brown
RAYMOND L. BROWN

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-598

LOUISVILLE & NASHVILLE RAILROAD COMPANY and STEVE HAVARD,

Petitioners,

versus

RHEETA HASTY, A Minor, By and Through Her Mother and Next Friend, MRS. FAYE HASTY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

RESPONSE TO REPLY BRIEF

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INDEX

TABLE OF AUTHORITIES

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TO THE SUPREME COURT OF MISSISSIPPI

RESPONSE TO REPLY BRIEF

Petitioners cannot allow certain misstatements and erroneous conclusions of the Reply to go uncorrected.

JURISDICTION

The Reply contends that Equal Protection and Due Process were not properly raised in the Courts below.

Not only do the items cited in the Appendix to the Petition show to the contrary, but also in the early stages before the trial court, the Fourteenth Amendment was specifically raised. (See Motion to Dismiss, Appendix to Reply Brief.) The Reply thereafter concedes that the Fourteenth Amendment was raised at several early stages in the trial court, but, surprisingly, contends that there was no specific mention of Equal Protection and Due Process at that point. The Fourteenth Amendment to the Constitution of the United States is nothing if it is not a guarantee of Due Process and Equal Protection. These two guarantees comprise the entire amendment.

The denial of constitutional rights under the Fourteenth Amendment was raised (1) before trial in the Chancery Court, (2) on post-trial motion in the trial court, (3) on assignment of error in the Mississippi Supreme Court, (4) on brief and oral argument and (5) on petition for rehearing.

Also, as was shown in our Petition, the District Court for the Southern District of Mississippi handed down its decision holding the Mississippi attachment in chancery statute unconstitutional under the Fourteenth Amendment, on November 27, 1977, after briefing was completed and prior to oral argument in the Mississippi Supreme Court. *Mississippi Chemical Corporation* v. *Chemical Construction Corporation*, 444 F.Supp. 925 (S.D.Miss.1977). The Court noted that Petitioners had brought that case to its attention, but the Court declined to follow it.

The Reply urges, procedurally, that Petitioners made a general appearance at the same time the motion to dismiss was filed, and, somehow, presumably, weakened the purpose of the motion. The motion, along with other objections, was filed prior to answer, and, therefore, was required to be ruled upon before Petitioners could be put to trial; moreover, the statute in Mississippi, Section 11-31-1, Mississippi Code, 1972, (Petition, 17a), says that mere service of the attachment process on the defendant will support *in personam* judgment the same as if personal or general appearance had been made. The only way to prevent it is to appear. Finally, no issue or question of special appearance versus general appearance under state procedure was ever made at any point by Respondent.

SUPPLEMENTAL FACTS

The Reply incorrectly states that "the record clearly shows" that no assets were interfered with. The assets, personal and real, listed in the attachment (Petition, 8) were effectively attached under Sections 11-31-3 and 11-31-5 (Petition 17a-18a) the moment the process was served. Nowhere does the record reflect that attachment was ever released, although it later did develop that the Respondent was satisfied without physically holding railroad property after appearance was made.

Part of the constitutional problem with the statute is the fact that there is automatic pre-judgment attachment without notice.

ARGUMENT

This court should not be misled by the legalistic arguments Respondent makes to support the effective denial of justice being inflicted upon the Petitioner under the Mississippi attachment in chancery statutes. Section II of the Reply points up the absence of just support for Respondent's argument and the fact that as to L & N, the Mississippi attachment in chancery statutes serve only "to protect its citizens" from trial by a jury of their peers in a civil action for damages. The Reply, and especially Section II thereof, demonstrates there would be no other purpose in bringing this action in Chancery, unless it would be to have a particular judge.

Moreover, the context within which this action has been maintained demonstrates the manifest injustice being perpetrated upon Petitioners and others in Mississippi, and the urgent need for this court to take jurisdiction, find the Mississippi attachment in chancery statutes unconstitutional on their face and in their application to L & N and bring to a halt further proceedings in Chancery involving this and the other cases arising out of the same accident. It would further bring to a halt this on-going and continuous process of prejudgment attachments of non-resident, domesticated corporations for purposes of obtaining non-jury civil judgments.

The instant case involving Rheeta Hasty is one of six suits which have been filed arising out of a railroad

crossing accident at Gulfport, Mississippi, on April 21, 1973. A Ford van being driven by Richard Hasty was struck by an eastward freight train at a grade crossing in Gulfport, Mississippi. In that accident, Mr. Hasty, the driver, was fatally injured. His daughter, Rheeta Hasty, a passenger, then age sixteen, received serious personal injuries. His granddaughter by another daughter, Angela Michelle Hasty, a passenger, then twenty-two months old, also received serious personal injuries.

Suit was filed in the Circuit Court in Pascagoula, Jackson County, Mississippi, in behalf of Angela Michelle Hasty. The case was tried to a jury and resulted in a verdict for the railroad on November 15, 1973. Suit was then filed in behalf of Rheeta Hasty in both the Circuit Court of Jackson County, Mississippi, and in Chancery Court. Following the unfavorable verdict in the Angela Michelle Hasty case, Rheeta Hasty was allowed by the Court to dismiss the action then pending in Circuit Court on May 17, 1974. After attacking Chancery Court jurisdiction, being overruled, and having preserved the right of appeal, L & N defended the Rheeta Hasty case in Chancery Court on February 12, 1976. The Chancery Court rendered a verdict for the Plaintiff in the sum of $125,000.00. This verdict was appealed, affirmed, and is now the subject of the present Petition for Writ of Certiorari.

Remarkably, on March 26, 1976, approximately six weeks after the Chancellor rendered his verdict in the

Rheeta Hasty case, the Circuit Court judge granted a new trial in the Angela Michelle Hasty case. This was two years and four months after the jury had rendered its verdict in favor of L & N in that case.

Finally, two suits were filed for the alleged wrongful death of Richard Hasty. The first was filed in the United States District Court at Biloxi, Mississippi. Shortly thereafter, Plaintiff was allowed to non-suit and dismiss the action pending in Federal Court over objections of L & N. On May 27, 1976, a second action was filed for the alleged wrongful death of Richard Hasty in the Chancery Court of Jackson County, Mississippi. Again, after objecting to the jurisdiction of the court, raising the same constitutional questions and issues in this case, and being overruled by the Chancellor, L & N proceeded to defend the case. Evidence has been taken by the Chancellor sitting without a jury and the case is pending his decision.

In this last action involving the alleged wrongful death of Richard Hasty, L & N argued the unconstitutionality of the Mississippi attachment in chancery statutes because of their denial of due process for failing to require adequate notice and opportunity to respond, and also, in their application to L & N in allowing plaintiffs in selected cases against certain defendants to avoid trial by jury. On the question of the constitutionality of the Mississippi statutes, the Chancellor, in ruling upon the wrongful death case, found that in the instant case, that involving Rheeta

Hasty, the Supreme Court of Mississippi had clearly ruled that the Mississippi attachment statutes are not unconstitutional in their application to the railroad.

At the time the Petition for Certiorari in this case was being forwarded for filing in this Court, the United States Court of Appeals for the Fifth Circuit was adding to the body of law which points to Mississippi's statute as unconstitutional. On October 6, 1978, the Fifth Circuit in *Johnson* v. *American Credit Co. of Georgia*, 47 Law Week 2229, held a Georgia prejudgment attachment unconstitutional on its face as violating the due process clause of the Fourteenth Amendment. The statute is similar to Mississippi's, except that, unlike Mississippi's statute, Georgia's required a pre-attachment bond. In that case, Johnson's automobile was attached on an allegation of "absconding debtor", on the mere filing of an affidavit and bond. The same kinds of deficiencies condemned in numerous United States Supreme Court decisions were found by the Fifth Circuit.

With *Johnson* v. *American Credit Co., supra.*, the United States Supreme Court cases cited therein as well as in our Petition for Certiorari, and with *Mississippi Chemical Corporation* v. *Chemical Construction Corporation*, 444 F.Supp. 925 (S.D.Miss.1977), which *specifically* holds the Mississippi statute unconstitutional, we now find cases in conflict at *all* levels of the federal courts. Obviously, the Mississippi Supreme Court felt neither persuaded nor controlled by the specific holding of the *Chemico* case, or the law of the others.

It may be true that there is no constitutional right to a jury trial in a state court under the Seventh Amendment, as the Reply argues — although there should be — but, our primary contention in this regard is that the statute in Mississippi and its application to a non-resident domesticated corporation, is unequal discriminatory treatment. Residents, resident corporations and non-resident motorists with no property or debts in the state, are not subject to attachment and damage suit trials without jury, although they are subject to suit in State Court. It is quite another story for a non-resident, domesticated corporation, having property or debts in Mississippi as we have amply shown.

The Reply suggests as justification for the distinction the right of a non-resident to remove the case to Federal Court. Such a right is illusory. Diversity can be easily defeated, as here, by joining a defendant whose state of residence is the same as plaintiff's. Petitioner had no right to remove the instant case to Federal Court.

CONCLUSION

The Reply seeks to mislead this Court as to Petitioners' complaints of denial of constitutional rights. From the time of the filing of the second of several pretrial motions and objections in the trial court, the Fourteenth Amendment, along with the Fifth and Seventh, was being raised.

Something has to be done about the Mississippi statute, already held unconstitutional by a United States District Court, and its continued use on non-resident, domesticated corporations.

What else can L & N legitimately do to raise valid constitutional issues in the courts of the State of Mississippi? L & N does not seek to avoid trial in Mississippi. It seeks to have the same rights as all other civil defendants. The desperate treatment of L & N in these cases demonstrates the need for this court to take jurisdiction and to correct this unjust and unfair arrangement made possible by the Mississippi attachment in chancery statutes. Plaintiffs should not be allowed to whipsaw the L & N between Chancellor and jury when the sole basis for doing so is to preserve the right to whipsaw. Section II of the Reply shows what is clearly an admitted fact that the railroad stands ready to defend itself within the State of Mississippi and to respond in damages when such awards are properly made.

The Mississippi statute is not only being tested again as to its constitutionality in a companion case under consideration in the trial court, but it is continuing to be applied unconstitutionally to others, and so long as the cited federal decisions remain on the books, the issue of the constitutionality of the statute and its application will continue to be raised by unfairly treated defendants in Mississippi. Recent decisions have brought the issues more squarely into light. They will not go away. The statute is unconstitutional on its face

and as applied. It would be unfair to Petitioner in the instant case to deny certiorari, only to have this Court rule in the future, as it most certainly will sooner or later, that the Mississippi statute is unconstitutional.

Certiorari should be granted.

Respectfully submitted,

RAYMOND L. BROWN
P. O. Box 787
Pascagoula, Mississippi 39567
Telephone: (601) 762-2271
Attorney for Petitioners

MEGEHEE, BROWN & WILLIAMS, P.A.
Attorneys for Petitioners

CERTIFICATE

I, RAYMOND L. BROWN, attorney of record for the Petitioners, Louisville & Nashville Railroad and Steve Havard, do hereby certify that I have mailed this day, by United States mail, postage pre-paid, three (3) true and correct copies of the foregoing printed Response to Reply Brief to John L. Hunter, Attorney for the Respondent, at his usual mailing address of Post Office Box 1287, Pascagoula, Mississippi 39567.

THIS THE ___ day of November, 1978.

RAYMOND L. BROWN